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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXIV.

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[10 MONTANA, 5.]

VENDOR AND VENDEE — OPTION TO PURCHASE — CONSIDERATION. — An option for the purchase of land, limited to a certain time for a certain consideration, cannot be extended beyond that time by contract without a new consideration. Such contract is *nudum pactum*, and void.

VENDOR AND VENDEE — VOID OPTION AS CONTINUING OFFER TO SELL — SPECIFIC PERFORMANCE. — An option for the purchase of land, though void as an option because of an extension of time without new consideration, is still valid as a continuing offer to sell, and if accepted before retraction, together with a tender of the purchase price, it constitutes a contract upon which specific performance may be had.

VENDOR AND VENDEE — CONTRACT FOR PURCHASE — STATUTE OF FRAUDS. — An option or contract for the purchase of land signed by the vendor alone may be enforced by the vendee under a statute of frauds not requiring the writing to be signed by the party sought to be charged, but only by the party by whom the sale is to be made.

VENDOR AND VENDEE — CONTRACT OF SALE — SPECIFIC PERFORMANCE. — A complaint in an action for the specific performance of a contract for the sale of land need not allege the non-existence of a complete or adequate remedy at law in damages.

VENDOR AND VENDEE — CONTRACT OF SALE — SPECIFIC PERFORMANCE. — A complaint in an action for the specific performance of a contract for the sale of land, alleging that the vendor was the owner thereof at the time of the execution of the contract, need not allege that he was the owner at the time that such complaint was filed.

ACTION for specific performance based upon a written option signed by one Leiser on September 24, 1889, by which he, for a consideration of one dollar, gave one Ide the sole right to purchase certain land within ten days from that date, and agreed to furnish a good and sufficient deed thereto. This option also had indorsed upon it the following: "I hereby extend

the above option for a period of ten days from this date, October 3, 1889. J. J. LEISER." On October 11, 1889, Ide tendered Leiser the purchase price agreed upon, and demanded a deed. Leiser refused to convey. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, judgment rendered for defendant, and plaintiff appealed.

A. O. Botkin, for the appellant.

McCutcheon and McIntire, for the respondent.

DE WITT, J. For convenience of terms, we will designate the original document pleaded as the first instrument, and the option therein as the first option, and the indorsement extending the time as the second instrument and option. We will not discuss the validity of the first instrument as a foundation for an action for specific performance. We will assume, for the purpose of this decision, that it is good. The option assumed to be granted therein was not exercised within the time limited, and expired October 4th. The consideration for this option was one dollar; whether paid by Ide to Leiser, or still a debt owing from Ide to Leiser, is immaterial. That consideration was exhausted by the expiration of the option on October 4th. Ide paid his money, the one dollar, and received his goods, the option. Leiser took the one dollar, and delivered a consideration therefor, viz., the option. The transaction was complete, and the terms performed by each party to the agreement.

We come to the second instrument and option. No consideration is named therein, specifically or by reference. The consideration for the first option cannot do service for the second. That consideration was *functus officio* in the first instrument. A consideration determined by the parties to be the consideration for the sale of one article on one day, and so declared in writing, cannot, in the face of such declaration, be construed by the court as a consideration for the sale of another article on another day. The first ten days' option was a thing of value, and paid for as such. The second was another separate valuable article. Was there any consideration for its sale?

We believe some definitions and distinctions will aid this discussion. There may be,—1. A sale of lands; 2. An agreement to sell land; and 3. What is popularly called an option. The first is the actual transfer of title from grantor to grantee,

by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur, by which the contemplated sale never takes place. The third, an option, originally, is neither a sale nor an agreement to sell. It is simply a contract, by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, — viz., the right or privilege to buy at the election, or option, of the other party. The second party gets *in præsenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands (except to the second party), for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflation of prices, perhaps of great value. A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract. That is to say, the lands are not sold. The contract is not executed as to them, but the option is as completely sold and transferred *in præsenti* as a piece of personal property instantly delivered on payment of the price. Now, this option, this article of value and of commerce, must have a consideration to support its sale. As it is distinct from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although if a sale of the lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, as a part payment on the price of the lands. But there must be some consideration upon which the finger may be placed, and of which it may be said, this was given by the proposed vendee to the proposed vendor of the lands, as the price for the option, or privilege to purchase. We have been led into this endeavor to make clear our views of these distinctions, because, in the argument, counsel did not seem to give them as much weight as

they seem to us to demand. We refer to the following authorities: *Gordon v. Darnell*, 5 Col. 302; *Bradford v. Foster*, 87 Tenn. 4; *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. 224; *Bean v. Burbank*, 16 Me. 458; 33 Am. Dec. 681; *De Rutte v. Muldrow*, 16 Cal. 505; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Thompson v. Dill*, 30 Ala. 444; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Thorne v. Deas*, 4 Johns. 84; *Burnet v. Bisco*, 4 Johns. 235; *Lees v. Whitcomb*, 5 Bing. 34; Bishop on Contracts, secs. 77, 78; *McDonald v. Bewick*, 51 Mich. 79; *Schroeder v. Gemeinder*, 10 Nev. 355; *Woodruff v. Woodruff*, 44 N. J. Eq. 355; *Perkins v. Hadsell*, 50 Ill. 216; Waterman on Specific Performance, sec. 200.

Examine the two options granted in the case before us. L. sold I. an option for ten days from September 24th, for one dollar. He then gives an option for another ten days from October 3d; for what? For nothing. L. transfers this option, this incorporeal valuable something, for nothing. The transfer of the option was *nudum pactum*, and void. But the point just discussed being conceded, appellant still contends that this second instrument, or option, was a continuing offer to sell, at a given price, and was accepted by respondent before retracted, and that such acceptance, evidenced by and accompanied with the tender of the price and demand for a deed, constitutes an agreement to sell land which may be enforced in equity. We leave behind, now, our views of options, and consideration therefor, and meet a wholly different proposition.

Reading the two instruments together, we find that on October 3d L. extended to I. an offer to sell his lands at the price of one thousand dollars. There was no consideration for the offer, and it could have been nullified by L. at any time by withdrawal. But it was accepted by I., while outstanding, the price tendered, and deed demanded. It must be plain, from the previous discussion, that we do not hold that the offer when made, or at any moment before acceptance, was a sale of lands, an agreement to sell lands, or an option. But, upon acceptance and tender, was not a contract completed? If one person offers to another to sell his property for a named price, and while the offer is unretracted the other accept, tenders the money, and demands the property, that is a sale. The proposition is elementary. The property belongs to the vendee, and the money to the vendor. Such is precisely the situation of the parties herein.

L. offered to sell for one thousand dollars. I. accepted, tendered the price, and demanded the property. Every element of a contract was present, — parties, subject-matter, consideration, meeting of the minds, and mutuality. And as to the matter of mutuality, we are now beyond the defective option. We have simply an offer at a price, acceptance, payment or tender, and demand. That this was a valid contract we cannot for a moment doubt.

In discussing a transaction of this nature, in *Gordon v. Darnell*, 5 Col. 304, Beck, C. J., in a clear opinion, says: "Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase-money, or performance of its conditions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell." Lurton, J., in *Bradford v. Foster*, 87 Tenn. 8, says: "Before acceptance, such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance while outstanding which gives an option not given upon a consideration vitality." In *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. 227, we find the following by Fletcher, J.: "In the present case, though the writing signed by the defendants was but an offer, and an offer that might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and during the whole of that time it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract." This case readily distinguishes *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681, which may seem to hold a contrary doctrine. It also repudiates *Cooke v. Oxley*, 3 Term Rep. 653, and claims that the English case is said to be inaccurately reported, and, in any event, entirely disregarded in the later decisions: See also *De Rutte v. Muldrow*, 16 Cal. 505; *Thompson v. Dill*, 30 Ala. 444; *Goodpaster v. Porter*, 11 Iowa, 161; *Vassault v. Edwards*, 43 Cal. 458; *Black v. Woodrow*, 39 Md. 194; Bishop on Contracts, secs. 77, 78; *Woodruff v. Woodruff*, 44 N. J. Eq. 355; *Shirley v. Shirley*, 7 Blackf. 452; *Perkins v. Hadsell*, 50 Ill. 216; *Lowber v. Connit*, 36 Wis. 176; Pomeroy on Contracts, sec. 169, note 1. We cannot but conclude that the transaction in the case at bar constituted a valid contract, upon which specific performance may be had.

But conceding that the contract is *per se* good, it is urged that it is void under the statute of frauds. The statute is as follows: "Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made": Comp. Stats., sec. 219, p. 652.

It is argued that the contract could not be enforced against the plaintiff, if he were the party sought to be charged, as he has not signed the instrument in writing, and that if it cannot be invoked against the plaintiff, by reason of the statute of frauds, it also cannot be urged against the defendant. But our statute does not require the writing to be signed by the party sought to be charged, but only by the party by whom the sale is to be made. We have these facts: The party by whom the sale was to be made, L., signed the memorandum expressing the consideration; the buyer accepted. Not only was the contract complete, but the statute was satisfied: *Bean v. Burbank*, 16 Me. 458; 88 Am. Dec. 681; *Vassault v. Edwards*, 48 Cal. 458; *Shirley v. Shirley*, 7 Blackf. 452; *Champlin v. Parish*, 11 Paige, 405; *Clason v. Bailey*, 14 Johns. 484; *Louber v. Connit*, 36 Wis. 176. We believe that this discussion leaves it clear that these views are not in conflict with *Ryan v. Dunphy*, 4 Mont. 842; *Mayer v. Cruse*, 5 Mont. 485; *Ducie v. Ford*, 8 Mont. 238. The demurrer on the point just investigated should have been overruled.

On behalf of the demurrer, it is again argued that the complaint is defective, in that it does not state that the plaintiff has no complete and adequate remedy at law in damages. It is undoubtedly the general rule that "in suits for specific performance, the party complaining must not only show the acts relied on as part performance, his willingness and ability to perform his part of the contract, but it must also appear that his position is such that an action at law for damages will not afford him adequate relief": *Ducie v. Ford*, 8 Mont. 240. But actions for the conveyance of real estate are an exception, or perhaps not an exception, but rather the presumption exists, from the nature of the case, that damages are not adequate relief. In *Baumann v. Pinckney*, 118 N. Y. 604, the court says (Vann, J.): "Thus it happened that the court directed that the complaint should be dismissed,

because the plaintiff had an adequate remedy at law. According to a long and unbroken line of decisions, the latter ground is clearly untenable. As early as 1835 it was said by Chancellor Walworth that a suit in equity against the vendee to compel a specific performance of a contract to purchase land had always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity, although the vendor has, in most cases, another remedy, by an action at law upon the agreement to purchase; . . . the right of the vendee to maintain specific performance is too well settled to require further discussion." And see cases there cited. See also Pomeroy's Eq. Jur., secs. 221, 1402; Story's Eq. Jur., sec. 746. We are of opinion that the demurrer, on this ground also, should have been overruled. We are again asked to sustain the demurrer, for the reason that the complaint does not allege that it is within the power of the defendant to make the conveyance, in pursuance to a decree of the court so requiring him; that is to say, the complaint should allege that the defendant was still, at the time of filing the complaint, the owner of the land. The incapacity of the defendant to perform, to be an excuse, must exist at the time of the hearing. If he did not possess the subject-matter at the time of making the contract, this does not constitute legal impossibility, if he acquired it subsequently, at or before the hearing: Pomeroy's Eq. Jur., sec. 1405, note 1, and cases cited. We do not now know what may be made to appear on the hearing. That is not reached. We examine now only a demurrer to the complaint, which confesses all the facts alleged in the complaint. The complaint alleges that the defendant was the owner on September 24th, when he executed the writing. He has never withdrawn his offer to sell. The offer ripened into a contract October 11th. The complaint was filed the same day. If a person, having executed a contract for the sale of lands, knowingly executes any other agreement to sell or dispose of the same lands to another person, he is guilty of a felony: Crim. Laws, sec. 200. Must the complaint allege that defendant has not committed a felony? If defendant has parted with the land *ad interim*, it is a fact peculiarly within his own knowledge, — knowledge which it may well be impossible to come to the plaintiff.

"It must be that in an action of this kind the complaint must make a case in which the defendant is at least able to

perform": *Joseph v. Holt*, 37 Cal. 256. Elliot, C. J., in *Cottrell v. Cottrell*, 81 Ind. 88, says: "The principal objection urged against it [the complaint] is, that the first paragraph does not allege that the ancestor of the appellants had any title to the property which it is alleged he agreed to convey, and is therefore bad. There are facts stated which show title in the decedent. . . . If the appellee is content with such title as a conveyance from the heirs of the deceased vendor will convey, the appellants should not be allowed to prevent him from securing it. The ancestor had bargained away all the title he had, and whether that was much or little, the appellee's contract vested in him the right to have that for which he had contracted. It cannot be of importance to appellants whether that title was perfect or imperfect, for the appellee has a right to it, whatever its character may be. If he is satisfied, they cannot complain, for it never descended to them, but had vested in the appellee prior to the death of their ancestor."

In the case before us, the plaintiff could preserve the *status in quo*, against innocent purchasers from the defendant, by filing a notice of *lis pendens*. It is not necessary to say what might be our views upon the question of the inability of the defendant to perform on the appearance of further facts at the hearing. We are of the opinion, under all the circumstances of this case, that the complaint shows a *prima facie* case as to this point, and that the demurrer in this behalf should be overruled. These views seem to us to be the exercise of a sound discretion: *Schroeder v. Gemeinder*, 10 Nev. 369; *Pomeroy's Eq. Jur.*, secs. 860, 1404.

The judgment of the district court is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

VENDOR AND VENDEE — OPTION TO PURCHASE — CONSIDERATION. — An agreement or promise to extend the time for the exercise of an option to buy, unsupported by a consideration, is a mere *nudum pactum*, and is not enforceable: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417, and note. The tender of the purchase price after the time designated in the agreement to sell will not entitle the vendee to specific performance: *Martin v. Morgan*, 87 Cal. 203; 22 Am. St. Rep. 240, and note. The question as to whether and when time is of the essence of a contract to convey land discussed at length: *Green v. Covilland*, 10 Cal. 317; 70 Am. Dec. 725, and note.

VENDOR AND VENDEE — VOID OPTION AS A CONTINUING OFFER TO SELL. — An option to buy land, though void on account of an extension of time,

may yet operate as a continuing offer, until withdrawn by the party making it: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417, and note.

VENDOR AND VENDEE — STATUTE OF FRAUDS. — A memorandum of a sale of real estate which does not name or describe the vendor is defective: *Mentz v. Newmiller*, 122 N. Y. 491; 19 Am. St. Rep. 514, and note.

STATE v. McDONALD.

[10 MONTANA, 21.]

CRIMINAL LAW — LARCENY — VARIANCE BETWEEN ALLEGATION AND PROOF.

— An indictment charging grand larceny in stealing "one iron-gray horse, a gelding," is not supported by proof showing the theft of a "horse" or "colt," and the variance is fatal to conviction.

CONVICTION under an indictment charging grand larceny in stealing "one iron-gray horse, a gelding." Such indictment was drawn under a statute providing that "if any person or persons shall steal, or, with intent to steal, shall take, carry, drive, lead, or entice away, any mare, gelding, stallion, colt, foal or filly, mule or ass, ox, cow, bull, stag, heifer, steer, or calf, being the property of another, of whatever value, he or they shall be deemed guilty of grand larceny." On the trial, the indictment was only supported by proof describing the animal alleged to have been stolen as a "horse" or "colt."

F. N. and S. H. McIntire, for the appellant.

Henri J. Haskell, attorney-general, for the state.

DE WITT, J. A horse is "a neighing quadruped used in war, draught, and carriage": Johnson's Dict. Webster uses the term in two senses: 1. Generically, as the animal simply, including all variations of age, sex, and condition; 2. Specially, as indicating the male in distinction to the female. We believe that the term has a third sense, a popular sense, as denoting a castrated male in distinction to a stallion. The indictment is carelessly drawn. It describes the animal as "an iron-gray horse, a gelding." A "gelding" is a fully castrated horse, in distinction to a "stallion," who is possessed of all his parts, and a "ridgling," which is deprived of half of them. How the pleader used the word "horse" in the indictment we can determine only from the context. If he employed it in the first sense, generically, then the word "gelding," following, defined and specialized the general term, and indicated the variety of "horse" intended, to wit, a gelding;

and the allegation amounts to a charge of stealing a gelding. If the word "horse" were used in the second sense, it is equivalent to alleging that the animal was a male, and then by adding the word "gelding," describing the kind of a male; that is, a "gelding," in distinction to a "stallion." Again, if the word "horse" be employed in its most restricted sense, as meaning a castrated animal of the species, we have simply the description of a gelding. We conclude that the indictment describes the larceny of a gelding. Is the charge proved by evidence of the stealing of a "colt" or "horse"?

The statute is a special one, making the taking of certain animals grand larceny, without regard to the amount of the value. Statutes similar to this one use the descriptive terms "horse, mare, gelding, colt, filly, ass," etc. Our statute omits the word "horse." In the statutes employing this word as a description of one of the subjects of larceny, "horse" means the unaltered male animal: See cases *infra*. Our statute supplies that term so used by the word "stallion." In the states having the statutes referred to, it is held that an indictment for stealing a horse is not supported by evidence of larceny of a gelding, and *vice versa*: *Hooker v. State*, 4 Ohio, 348; *State v. Buckles*, 26 Kan. 237; *Turley v. State*, 3 Humph. 323; *Jordt v. State*, 31 Tex. 571; 98 Am. Dec. 550; *Banks v. State*, 28 Tex. 644; *Brisco v. State*, 4 Tex. App. 219; 30 Am. Rep. 162, and Texas cases cited in Bishop on Statutory Crimes, sec. 248, note 5; Wharton's Criminal Evidence, sec. 124; Wharton's Precedents on Indictments, 415, note a; *State v. Royster*, 65 N. C. 539; *State v. Plunket*, 2 Stew. 569. Applying the doctrines of those cases to the descriptive words used in our statute, an indictment for the larceny of a stallion would fail on proof of the taking of a gelding, and *vice versa*. In the case at bar, the larceny alleged is of a gelding; the proof is of a horse,—something not included in the special statute describing the subjects of larceny within the purview of its special provisions. When the witnesses testified about a horse, they meant to describe something; but what was in their minds their words do not disclose. If they used the word in the first sense indicated above, they meant "a neighing quadruped used in war, draught, and carriage," including not only males and females, but males possessed of all of the gifts of nature, or deprived of such endowments by the art of man, and stallions, geldings, ridglings, and mares, old and young, grown and colts. If the witnesses confined the

term to the second definition of a horse, which we have shown obtains, they testified about a stallion. If they employed the word in the third and most restricted sense, they may have intended a gelding. But there is nothing to indicate that such was the signification. Thus, in the indictment, we have the description of one definite well-known object; in the proof, a term which may be applied to a half-dozen different objects. The matter is not aided if we take the testimony that the animal was simply a colt. "Colt" is separately named in the statute, and proof of stealing a colt does not support an indictment for taking a gelding, under this specially descriptive statute. Not only is the weight of authority with these distinctions, but we are of opinion that they are well taken, and not technical. A defendant is not proven guilty if it be shown that he took, not the article charged in the indictment, but may have taken one of several others, when the statute specially distinguishes between the objects.

The judgment is reversed, and the cause remanded for a new trial.

CRIMINAL LAW — LARCENY — VARIANCE. — A ridgling (a half-castrated horse) is not a gelding, within a statute providing against the theft of "any horse, gelding, mare, colt, ass, or mule"; and an indictment charging the theft of a gelding is not supported by proof that the animal was a ridgling: *Brisco v. State*, 4 Tex. App. 219; 30 Am. Rep. 162. Under the same statute as above, where the indictment charged the theft of a filly, and the proof showed the theft of a mare, the variance was held to be fatal: *Lunsford v. State*, 1 Tex. App. 448; 28 Am. Rep. 414. An indictment for stealing a horse is not sustained by proof of the theft of a gelding: *Jordt v. State*, 31 Tex. 571; 98 Am. Dec. 550, and note. An indictment charging the theft of a trunk from a warehouse is not sustained by proof that it was taken from an open passageway in a depot: *Lynch v. State*, 89 Ala. 18.

BARDEN v. MONTANA CLUB.

[10 MONTANA, 330.]

LIQUOR LAWS — SOCIAL CLUB — LICENSE. — A social club, incorporated for literary, educational, social, and mutual improvement purposes, and not to evade the liquor laws, and which keeps a stock of liquors, furnished its members only, without profit to itself, is not a retail liquor seller within the meaning of a statute imposing a license on all persons who deal in, sell, or dispose of intoxicating liquors at retail.

PRACTICE ON APPEAL. — The appellate court cannot review the evidence in the transcript on appeal, for the purpose of finding the facts and ordering judgment to be entered accordingly.

Bach and Buck, for the appellant.

Henri J. Haskell, attorney-general, and *C. B. Nolan*, county attorney, for the respondent.

BLAKE, C. J. This is an appeal from a judgment which was entered against the Montana Club, for the recovery of a license tax, under the following statute: "All persons who deal in, sell, or dispose of, directly or indirectly, any spirituous, alcoholic, vinous, or malt liquors in any quantity less than one quart shall, before the transaction of such business, obtain a license, for which he or they shall pay as follows": Stats. 15th Ex. Sess. 74.

The Montana Club was incorporated under the laws of the territory, and the articles contained the following certificate: "The particular business or objects for which the association is formed are as follows, to wit, for literary, educational, and social purposes, and for mutual improvement and benefit, and to maintain in the said city of Helena, in said county and territory, apartments fitted with the proper fixtures, and furnished with the proper furniture and appurtenances, to be used for said purposes by ourselves, and our associates and successors, and to do each and every other act and thing necessary and convenient for the maintenance and perpetuation of a social club in said city of Helena." The articles bear the date of March 23, 1885.

The transcript contains an admission, in these words: "It was also admitted by the counsel for the state that the membership is about 225; that members pay their annual dues, in the case of resident members, \$40 a year, and in case of non-resident members, \$20 a year, and an initiation fee of \$100; that the club pays a rental for its rooms of \$100 dollars a month; and it employs a steward at a salary of \$100 a month; employs a bar-keeper, a man who takes charge of what is called the bar of the club, at \$100 a month, and three other employees, at salaries of about \$75 a month each." It is also conceded by counsel that the club has a library and magazines and newspapers for the use of the members; that persons who do not reside in the city of Helena can be admitted to the privileges of the corporation for the period of ten days upon the receipt of a card from a member; that the invited guests and members can obtain at the bar of the club all the liquors which are mentioned in the statute *supra*, upon a compliance with the rules; and the member who introduces a

visitor is responsible for the indebtedness which may be incurred thereby, although the latter is primarily liable. It is further shown that the daily receipts from the disposal of the liquors by the club amounted to forty dollars.

The following among other findings were made by the court below: "That on the first day of April, A. D. 1890, at Helena, said county and state, the defendant corporation, through its agents, did sell and dispose of spirituous, vinous, and malt liquors in quantities less than a quart to its members, permanent and temporary, and continues so to do, and has made sales of liquors as aforesaid to persons from abroad who, according to the rules of the club, had secured a temporary or provisional membership; . . . that the liquors disposed of by said defendant corporation were the property of said corporation, and were purchased by said corporation with corporate funds; . . . that said liquors were disposed of at a profit by said club."

The conclusions of law were stated as follows: "1. That the disposal of liquors by the club to its members, permanent and temporary, constitutes a sale of said liquors; 2. That the sale of liquors by the club to its members constitutes a business, for the carrying on of which the club is liable for the payment of a license." The fourth specification of errors is, that "there is no evidence to show, or to justify the finding of fact by the court, that the defendant has ever disposed of liquors of any kind at a profit." An examination of the testimony compels us to sustain this proposition. Four witnesses were called for the state, and testified upon this point. Three of them were officers of the club, and stated positively that there was no profit in the sales of the liquors at the bar, and that a committee adjusted the prices for the sole purpose of paying the expenses thereof, including the purchases. Another person testified: "Of my own personal knowledge I don't know of any profit made there to-day." The foregoing finding must be set aside and disregarded in reviewing the legal questions which are before us.

The authorities which discuss the problems to be solved in this case cannot be reconciled. Some of the decisions which have been cited relate to associations that have been organized for the purpose of evading and violating the law restraining the sale of intoxicating liquors. They are inapplicable to the present inquiry, for no charge of this nature has been uttered against the appellant. Such is *State v. Mercer*, 32 Iowa, 405.

In the opinion of the court, Mr. Justice Beck referred to the articles of association of the Winterset Social Club, and said: "They appear, by the statement of counsel, to have been nothing more than the foundation of an organization the object and intent of which was to evade the law for the suppression of intemperance,—a rather clumsy device by which the defendant and the members of the 'social club' hoped to defeat that law and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. The fact that under the arrangement of selling tickets the members of the club became the owners of the liquors to the extent of the money paid does not make the sale of the liquors in that way lawful." The statute which was interpreted by the court formed a part of what is generally designated as a prohibitory liquor law, and did not relate to any system of taxation. The case of *Marmont v. State*, 48 Ind. 21, belongs to the same class, and the opinion says that "the appellant was indicted, tried, and convicted, in the court below, for selling intoxicating liquors on Sunday, and permitting them to be drunk upon the premises." Chief Justice Buskirk, in the opinion, gives at length the statement of facts concerning the Modock Club, and proceeds: "It is agreed that each member, upon his initiation, pays fifty cents, and thereafter a monthly assessment of ten cents, to form the basis of a fund for payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs; which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into, and direct the payment of necessary reliefs in, all such cases. . . . When the society appointed the appellant its agent for the sale of its beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might be willing to pay for, and appropriate it to his individual use. If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach to the

law and its administration, if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will." To the same effect are *Rickart v. People*, 79 Ill. 85; *State v. Horacek*, 41 Kan. 87; *State v. Lockyear*, 95 N. C. 633; 59 Am. Rep. 287. It should be observed that these citations support the contention of the respondent that the transaction which is described in the case at bar possessed the elements of a sale. It must be further admitted that the following authorities are directly in point, and uphold the ruling of the court below: *United States v. Wittig*, 2 Low. 466; *Martin v. State*, 59 Ala. 34; *People v. Andrews*, 115 N. Y. 427; *People v. Soule*, 74 Mich. 250; *Chesapeake Club v. State*, 63 Md. 446; *State v. Essex Club*, 53 N. J. L. 99. They assert generally that the property which belonged to the corporation or club has been transferred for a valuable consideration to persons who have received it; that the intention or good faith of the members who authorized such acts is immaterial; and that the law contemplates that the license shall be paid for the disposal of liquors in this manner. The opinions in some of these cases are elaborate essays upon the question under consideration, and their conclusions have been fairly announced. We do not deny their weight, and will not attempt to refute the reasons upon which they are founded, and will go further, and say that the controversy is surrounded by uncertainty.

There are, however, well-considered cases in which a contrary view has been expressed: *Graff v. Evans*, 8 Q. B. Div. 373; *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419; *Commonwealth v. Smith*, 102 Mass. 144; *Commonwealth v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340; *Commonwealth v. Ewig*, 145 Mass. 119. In *Graff v. Evans*, 8 Q. B. Div. 373, Mr. Justice Field said: "In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language, in order to see whether the person against whom the penalty is sought to be enforced has committed an offense within the section. It is not disputed that the club was *bona fide* a club. I think the true construction of the rule is, that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether

or not a profit was made upon the sale of the liquors. . . . The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to 'sales' of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member, at a certain price. . . . There was no contract between two persons, because Foster was vendor as well as buyer. . . . I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section." Mr. Justice Huddleston concurred, and said: "It seems to me clear that Foster had a property, or at least an interest, in the goods which were transferred to him. Mr. Hill rightly designated that interest as a one eleven-hundredth share. Foster, on payment, got from the barman who served him the interest of the other 1,099 members, who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest. That, in my view, was the result of the transaction. I cannot think it was a sale of intoxicating liquors by retail.

In *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, Chief Justice Bartol, for the court, said: "It will be observed that the license laws (Code, art. 57), which forbid the sale or barter of spirituous or fermented liquors without a license, have never been construed as applicable to social clubs, of which there are several in Baltimore City, where liquors are procured for the use of the members, and are furnished to them in the manner described in the present case; and we think it very clear that no license is required, for the reason that such

a transaction is not a sale, within the meaning of the license laws. And by a parity of reason, we conclude that the members of such associations as the Concordia is admitted to be, who obtain refreshments and liquors at the club, by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy them from the corporation, nor can the corporation be said to sell them to the members, within the meaning of the act of 1866. . . . The society is not an ordinary corporation; but a voluntary association or club united for social purposes, — each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the articles furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade, and therefore not within the purview or meaning of the act of 1886." In *Chesapeake Club v. State*, 63 Md. 446, the doctrine of *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, was recognized, but held inapplicable, and the court said: "The language of the Sunday law of 1866, under which the case of *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, was decided, is altogether different from that of the act of 1882, chapter 112; and the decision in that case would seem to have been in the mind of the framers of the act of 1882, chapter 112; for by the latter act terms are employed more comprehensive, especially those making the act applicable to associations and corporations, than are to be found in the Sunday law of 1866."

A comparison of the statutes of the state of Maryland which are referred to in *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, and *Chesapeake Club v. State*, 63 Md. 446, illustrates clearly the distinctions which have been pointed out. In the first case, the court construed an act providing that "no person in this state shall sell, dispose of, barter, or, if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away, on the sabbath day, . . . any . . . spirituous or fermented liquors." In the last case, the court interpreted a statute embodying these clauses: "If any person or persons, house, company, corpora-

tion or association, or body corporate, shall sell, directly or indirectly, at any place, or give away at his, her, their, or its place of business, any spirituous or fermented liquors." And "in case of any violation of any provisions of this act by any company, corporation, or association, each or any member of such company, corporation, or association shall be liable, and shall suffer imprisonment." In *People v. Soule*, 74 Mich. 250, this statute was under consideration: "All saloons, restaurants, bars in taverns, or elsewhere, and all other places, except drug-stores, where any of the liquors mentioned in this act are sold or kept for sale." In *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, the court cites *Commonwealth v. Smith*, 102 Mass. 144, and the statutes in force when the decision was made, and Mr. Justice Field says, in the opinion: "Nothing is contained in that act, or in any subsequent acts, which, in terms, relates to clubs, until the statute of 1881, chapter 226, was passed. . . . The intention of this statute, however, plainly, is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes." The statute of 1881 which is mentioned in the opinion uses this language: "In any city or town in which the inhabitants vote . . . that licenses shall not be granted, all buildings or places therein used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquor to their members or others shall be deemed common nuisances; and whoever keeps or maintains, or assists in keeping or maintaining, such a common nuisance shall be punished." The court in *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, stated: "It must be assumed that the decision in *Commonwealth v. Smith*, 102 Mass. 144, was known to the legislature at the time the existing statutes were passed. The inference is, that the legislature intended that unlicensed clubs in cities and towns whose inhabitants vote to grant licenses must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, or exposing or keeping for sale, of intoxicating liquors."

The amendments which have been incorporated in the laws concerning licenses are instructive. The Revised Statutes provided for the payment of certain sums by "any person or

persons who shall keep any house, or saloon, or room, where any banking game or other game of chance is dealt or played for money": Rev. Stats., 5th div., sec. 805. This section was amended to read: "Any person or persons, or association of persons, who shall keep any house or saloon, or room or club-rooms, where any banking game or other game of chance is dealt or played for money": Stats. 13th Sess. 47. The last provisions and the act under which judgment was entered against the appellant are found in the Compiled Statutes, fifth division, sections 1346 and 1350. In 1887 these sections were amended in some respects, but the peculiar phraseology which has been specified was retained: Stats. 13th Extra Sess. 74, 75. The decisions involving the liability of the appellant to pay the license under our statute are contradictory, but a slight modification by the legislative power would decide plainly and finally the question. There is no room for construing the act relating to gambling games. When these distinctions are so carefully preserved, it is a reasonable inference that the legislature did not designate the business of the appellant in framing the law defining licenses.

The court below erred in its findings and conclusions that the Montana Club at the times set forth in the complaint made sales of intoxicating liquors. This court cannot review the evidence in the transcript and find the facts and order judgment to be entered accordingly: *Barkley v. Tieleke*, 2 Mont. 435; *Chumasero v. Vial*, 3 Mont. 376.

It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the order overruling the motion for a new trial be reversed, and that the cause be remanded for a new trial.

SOCIAL CLUBS — DISTRIBUTION OF LIQUORS BY — WHETHER IN VIOLATION OF LIQUOR LAWS. — In nearly every state of the Union social clubs exist, some of which are incorporated, and others are not, and which are conducted for the use of members only, to provide for their rational entertainment and amusement, both intellectual and social. They generally transact no business whatsoever for the purpose of making any profit, directly or indirectly, for themselves or their members, and the income derived from various sources is applied solely to defraying the expenses of the organization or incorporation. Their sources of income generally consist of an entrance or membership fee, collected from each new member, and such monthly dues as shall be assessed by the management or board of directors each month, together with money paid by members for what refreshments, liquors, and cigars they obtain for their personal use, or that of their especially invited friends, at the club-house, and such additional assessments, fines, and penalties as may be, from time to time, imposed upon the members. The money

thus received is expended in paying the current expenses of the club, and the other enumerated sources of income are seldom sufficient to meet such expenses without the imposition of additional assessments. The spirituous and fermented liquors consumed by the members are bought by the club, and kept therein under charge of a steward or manager, an employee of the club, under the supervision and control of the board of directors. The members of the club, and no other persons, except especially invited guests, can get what liquors they want, by a member calling for them upon the steward and paying a price fixed by the regulations of the club, either at the time, or at the end of each month, or at such other time as such regulations may require. This price for the liquor is fixed and paid, not for the purpose of making any profit, either directly or indirectly, but merely for the purpose of covering the outlay in the purchase thereof by the corporation or organization. The moneys received are used to replenish the stock of liquors so kept for the use of the members, and the expenses attendant upon the keeping and serving thereof at the club-house, and other expenses of the club.

The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases cannot be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale, and a violation of laws of the nature stated.

The cases sustaining this doctrine may be grouped thus: *State v. Neis*, 108 N. C. 787; *State v. Lockyear*, 95 N. C. 633; 59 Am. Rep. 287; *State v. Horacek*, 41 Kan. 87; *State v. Tindall*, 40 Mo. App. 271; *People v. Soule*, 74 Mich. 250; *State v. Essex Club*, 53 N. J. L. 99; *People v. Andrews*, 115 N. Y. 427; *Martin v. State*, 59 Ala. 34; *Marmont v. State*, 48 Ind. 21; *Chesapeake Club v. State*, 63 Md. 446; *State v. Easton Social etc. Club*, 73 Md. 97. The above cases maintain, eliminating all question of bad faith in the organization of the club, that the distribution of liquors by a *bona fide* club among its members is a sale within the inhibition of the liquor laws, while other cases hold that such distribution is a sale, on the ground that the organization of such a club is a mere clumsy device to evade such laws: *State v. Mercer*, 32 Iowa, 406; *Rickart v. People*, 79 Ill. 85; *State v. Tindall*, 40 Mo. App. 271.

In the well-considered case of *People v. Soule*, 74 Mich. 250, Morse, J., delivering the opinion of the court, said: "The element of bad faith in the organization of this club, which has been made to play an important part in the disposition of the main question involved here by some of the courts, seems to be eliminated from this record. The question is fairly raised whether a club properly organized, and in good faith, under act No. 22, Laws of 1883, can distribute liquors among its members, receiving pay for such liquors as they are distributed by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors or in paying expenses, without being liable under the laws of this state to pay a retail tax for selling such liquors. There is a diversity of opinion among the authorities on this question. Before examining the same, it seems to us to be proper to examine the policy of our present laws on the subject of the

sale of intoxicating liquors. In 1875, the legislature repealed the prohibitory law, which had been on trial for twenty years, and adopted in its stead the principle of restriction and taxation of the liquor traffic. This method of dealing with the sale of liquors has prevailed up to the present time. This club was formed in March, 1888, while the local-option law, since declared inoperative by this court, was upon the statute-books, and apparently liable to enforcement. It cannot, however, in the light of this record, be said that this club was organized for the express purpose of evading this law, nor is it to be considered in the determination of this case. The local option law was never in force for a moment in Kent County, and no election was held or called under that act. The tax law was in full force and effect at the time of the organization of this club, and at the time of the sales of liquor complained of in this prosecution. The law provides for the payment of a tax by retail dealers in liquors, and a retail dealer is defined as follows: 'Retail dealers of spiritous or intoxicating liquors, and brewed, malt, and fermented liquors, shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of three gallons or less, or one dozen quart bottles or less, at any one time, to any person or persons: Sec. 2, Act No. 313, Laws of 1887. Upon the 'business of selling' liquors at retail, the tax is fixed at five hundred dollars per annum. Any person or persons engaged in the business of selling liquors without the payment of the tax in full are deemed to be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than two hundred dollars, and costs of prosecution, or by imprisonment in the county jail not less than ten days or more than ninety days, or both such fine and imprisonment, in the discretion of the court: Sec. 7, Act No. 313, Laws of 1887. This provision of the law was not aimed at saloons or public bars alone, but it is further provided in the act that 'all saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug-stores, where any of the liquors mentioned in this act are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week,' etc.: Sec. 17, Act No. 313, Laws of 1887. It must be held, I think, that the liquors purchased and kept by this club were, before they were dealt out to the members, the property of the corporation. When the liquor was passed by the agent of the corporation, the respondent in this case, over to the individual member, it became his property, and was a sale to him, as he paid for it when it was delivered to him. He could then do with it as he pleased,—drink it himself, give it to a friend to drink, or throw it away. Being sold within the quantity prescribed by statute, it was a sale by retail, and, the corporation or its agent making a business of it, the sales constituted the 'business of selling' by retail. The law includes all persons, and the places of sale prohibited without the payment of the tax are not limited. It reaches a club-house or a private house, as well as a saloon or tavern. The object of the law is to tax the business wherever found, or by whom carried on. We are cited to some cases which are supposed to support the contention of respondent, which we will now notice. The supreme court of Massachusetts has twice passed upon similar organizations. In the first case, 'several persons formed a club, of which the defendant was a member; they advanced a certain sum of money each, which was put into a common fund, the defendant was chosen agent of the club, and, under instructions of the club, purchased liquors and refreshments for the club; the fund was taken by the defendant, and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the

club, to the extent of the money advanced by each. These checks were transferable only to other members of the club; upon presentation of the checks by any member to the defendant, he would deliver to that member liquor of the club to the amount of the checks presented.' Upon 'distributing' the liquor in this manner, it was calculated that the liquor would so far overrun the amount to be delivered upon the checks as to leave in undelivered liquor about twenty-five per cent of the original cost. This the defendant had for his services and the use of his room for the club. The court held that 'if the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance, within the meaning of the statute' which declared that the keeping and maintaining of a tenement used for the illegal keeping and illegal sale of liquors should be punished as a common nuisance. 'On the other hand, if the whole arrangement were a mere evasion, and the substance of the transaction were a lending of money to the defendant, that he might buy intoxicating liquors, to be afterwards sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted': *Commonwealth v. Smith*, 102 Mass. 144.

"This decision was apparently grounded upon the theory that in the case, as first supposed, there would be no sale of the liquors, but simply a distribution of the common property equally among the members of the association or corporation club. This is not the case at bar. There is no equal distribution of common property here among the members of the club, but a sale by the club to the individual member, without any reference to his share in the common fund, or the stock of liquors owned in common by the club. In the case of *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340, the club was organized on a similar basis with the one considered in 102 Massachusetts, except that instead of distributing to each member, in the first place, checks representing the full value of his share in the common stock, a steward, who was paid for his services, kept checks for sale. Each member, upon joining the club, paid an admission fee of one dollar, and received a card certifying his membership. The money thus obtained was used in buying liquors. The steward furnished the checks, each representing five cents, to individual members in such numbers as were called for, and received pay for them at five cents each. The steward was complained against for keeping intoxicating liquors with intent unlawfully to sell the same, and was convicted in the trial court. The supreme court held that the law had not undertaken to prohibit the drinking or buying of intoxicating liquor, or the distribution of it in severalty among persons who owned it in common; and that if two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. The court assumed 'that the liquors were owned in common by the members, that they were furnished only to members, and that they were kept by the defendant as one of the members and as steward of the association,' and granted a new trial. It does not appear that either of the clubs in these cases was incorporated. In *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298, the club was incorporated under the laws of that state for literary and social purposes. In the charter of the club it was provided that 'the general wel-

fare of society, and not individual profit,' was the object of the association; 'and hence the members are not stockholders, in the legal sense of the term, and no dividends or profits shall be divided among the members.' The initiation fee was fifty dollars, and the monthly dues three dollars. The club was used as a home, except for lodgings, and some of its members spent much of their time there every day. No one but members of the club had admission to the same, save friends of members living and residing outside of Shelby County, in which the club was situated. One of its leading features was musical entertainments by amateurs, at which the daughters and lady friends of the members participated. Periodicals and leading newspapers were taken and kept in the reading-room, and a general library of books. Among other things, the club kept a small stock of liquors, wines, and cigars, which were dispensed to the members at a price fixed by a governing committee, not with a view, however, of making any profit, which was expressly forbidden by the charter, but simply for the accommodation and convenience of its members. The money paid for refreshments was reinvested by the secretary of the club in like refreshments used and consumed by its members. The liquors and refreshments were in the charge and custody of an officer and servants of the club, who attended to wait on its members. The court find that the object of the sale of the liquors was not for the purposes of profit, but merely for the purpose of covering the outlay in the purchase thereof by the corporation, and the expense attending upon the keeping and serving thereof at the club-house. The club was held not liable to pay a tax as a retail dealer in liquors, on the ground that the liquors were not kept for sale to the public or as a traffic, being purchased out of the common fund, and kept for the exclusive use of the members of the club, and not sold for or at a profit. It was determined that the mode of 'sale,' as it is termed, to the members, at a rate fixed by the governing committee of the club, is only in fact an equitable and convenient mode of distributing refreshments to its members, which are provided by the club for them exclusively; and it was squarely held that such a club had the right to purchase and keep liquors at its club-rooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assessments upon its members; and further, that the mode adopted by the Tennessee Club of the 'form of a sale' alone to its members, of such a quantity for so much money, could be nothing more than a mode adopted of assessing each member in proportion to the amount he consumed. Not satisfied, however, with this reason for its decision, the court reviewed the statutes of Tennessee on the subject, and held, from its construction of the same, that the legislature did not intend to impose a tax as retail dealers upon clubs organized and conducted as was the club in question in this case.

"In *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, the court of appeals in that state held that the license laws for sale of liquors did not apply to social clubs. In this case the corporation was known as the Concordia, and the persons arrested for violation of a Sunday law were the president, secretary, and treasurer of the corporation. The statute provided that no person should 'sell, dispose of, or barter . . . any spirituous or fermented liquors, cordials, lager beer, wine, cider, or any other goods, wares, or merchandise whatsoever,' on the sabbath day, commonly called Sunday, nor should any dealer in any of the articles give away the same on that day, under a penalty. Seim and the others were indicted under three counts, —

one charging them with 'selling beer,' and one with 'disposing of' beer, to one Springer, on Sunday, and the last count with 'giving away' beer as 'licensed dealer.' The third count was abandoned on the trial. The Concordia was incorporated under the general incorporation law of the state. By its charter the society was 'dedicated to the intellectual, moral, and social improvement of its members, the refinement of their tastes, and the development of good feeling among them.' It is to 'transact no business of any kind whatsoever for the purpose of making any profit, directly or indirectly, for itself or its members.' Its sources of income were set forth to be, — 1. Money loaned to build club-house by its active members; 2. Entrance fee of ten dollars for each new member; 3. Annual fee of thirty dollars for each member; 4. Money paid by members for what refreshments and liquors they get at the club-house; 5. Such additional assessments, fines, and penalties as may be imposed upon the members. These moneys are expended in, — 1. Paying current expenses of the corporation; 2. If there is any balance, in paying the interest on the loan of money to build club-house. Liquors are bought by the incorporation, and kept in the club-house, in the charge of a steward, an employee of the corporation. The members of the club, and no other persons, can get what liquors they want on any day, Sundays included, by calling for them, and paying a price fixed by the corporation. This price is fixed and paid, not for profit, but to cover the outlay for liquors, and the expense of keeping and serving them at the club-house. The sale to Springer, who was a member of the club, of a glass of beer, for which he paid five cents, the price fixed, and which he then and there drank, was proven on the day charged in the indictment. The court held, as before said, that the license laws of the state had never been construed as applicable to social clubs, for the reason that such a transaction as above described is not a sale, within the meaning of the license laws. The society is not an ordinary corporation, but a voluntary association or club united for social purposes. Each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the article furnished; and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade.

"There is also an English case on this subject: *Graff v. Evans*, L. R. 8 Q. B. Div. 373. The question was submitted whether the Grosvenor Club was liable under an act providing that 'no person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same.' The club was a *bona fide* one, properly constituted. The objects were 'social intercourse, mutual and moral improvement, aided by lectures and rational recreation.' One object was also to keep the members away from the public house. The members could obtain food and refreshments in the club, and wine and spirits, on payment. The produce of such sales went into the funds of the club. The club had no license to sell. A member of the club was shown on a certain day to have purchased a bottle of whisky and a bottle of pale ale, for which he paid. The bar-man wrapped the bottles up in paper, and the member 'carried them away out of the club openly and without concealment.' It was also shown that liquor to the value of two hundred pounds was sold annually to the members for consumption

'off the premises,' and that there was a profit on the sales to the amount of thirty-three per cent on the original cost. The court held that the member buying the liquor was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. 'A sale involves the elements of a bargain. There was no bargain here, nor any contract with Graff [the bar-man] with respect to the goods. Foster [the member who purchased the liquor] was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. . . . There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods, which was not a sale within the meaning of the statute.' On the other hand, the selling or distributing of liquors by similar clubs, or through their agency, has been held by other courts to be in violation of statutes prohibiting the sale of liquors: *State v. Mercer*, 32 Iowa, 405, 407; *State v. Lockyear*, 95 N. C. 633; 59 Am. Rep. 287; *Martin v. State*, 59 Ala. 35; *Rickart v. State*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21. In *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287, the Capital Club was organized and carried on almost identically the same as the corporation in *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298. Liquors were delivered in the same way, and procured and paid for, both by the club and its members, upon almost precisely the same plan. It was held to be a sale, and that all the elements of an executed contract were present. 'The corporate body, a legal entity, and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call, and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for and becomes the property of the club. Can there be any doubt that a corporation may make contracts, and deal with a corporator precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties?' The sale was held to be within and in violation of the local-option act of that state, the county in which this club was located having adopted prohibition under said act. In *Marmont v. State*, 48 Ind. 2, Chief Justice Buskirk, in his opinion, says: 'As the keg of beer, when purchased, belonged to the society, the question arises whether the society, by its agent, could make a valid sale of such beer to the persons composing such society. We know of no principle of law which prevents it.' It was therefore held a sale within the meaning of a prohibitory statute. I shall not quote further from the cases which support the position that the corporation in the case at bar was selling liquor at retail within the meaning of the statute. It appears to be a simple and unanswerable proposition that the liquor was in the first place owned by the corporation as corporate property the same as any person might own it; that when it was delivered to a member of the corporation for money paid to the corporation or its agent, and going into its funds, it was a sale to that member, the same as if it had been passed to a stranger to the corporation in the same way, and the liquor by such sale then becomes the absolute property of the member, the same as if he had purchased it in a saloon, or at any other place where it is sold. The reasoning which I have given in the cases cited, by which such a transaction is held not to be a sale, seems to me to be unsound, strained, and sophisti-

cal. In only one case, to wit, *Commonwealth v. Smith*, 102 Mass. 144, is there, to my mind, even the semblance of good reasoning. But in that case the association was not incorporated, and the persons uniting together each put in an equal amount of money in the first place, and were given an equal number of checks to represent their share in the liquors, which they could take upon presentation of their checks. This transaction was quite plausibly denominated a distribution of the liquors, and not a sale. But that case is not the one here before us, as heretofore shown."

In the late case of *State v. Neis*, 108 N. C. 787, Clark, J., in passing upon this question, said: "The transaction presented by the special verdict, stripped of surplusage, is this: The defendant was steward of the Cosmopolitan Club of Asheville, and was indicted for selling spirituous liquor to its members. In consequence of the decision in the analagous case of *State Lockyear*, 95 N. C. 633, 59 Am. Rep. 287, the state of facts being the same, he pleaded guilty. The club thereupon distributed a part of the liquors on hand to certain of its members, who placed them in the hands of the defendant, to be held by him, not for the club as a club, but for those individual members of the club as tenants in common, the share of each not being kept separate, but mingled in the same casks, jars, and demijohns. From time to time, as each of those members wished, he obtained drinks from the defendant for himself and friends, paying therefor in money (or giving tickets afterwards redeemed in money) as near as may be the cost price of the drinks so furnished, and with the money the defendant from, time to time, replenished the stock of liquors. We can see in this transaction no substantial distinction from the facts of Lockyear's case. There the steward of the club, as a club, received the money for drinks furnished at cost, and with the money replenished the stock of liquors. Here the individuals of the club, treating themselves as unorganized, furnished through defendant to themselves, from a common stock, the drinks at cost, and with the money received therefor replenished the common stock. When, in the present case, an individual received drinks for himself and friends, he clearly did not receive the identical liquor which belonged to himself, but he received liquor which belonged mostly to others, and in which he had a minute undivided interest. For his money he received in exchange liquor which belonged to several others as well as to himself, and converted it to his sole and separate use. Before the transaction, the money was solely his, and the liquor belonged to several. By virtue of the transaction, and in exchange for the money, the liquor became his sole and separate property. This is surely a sale. It has every element of a sale. It cannot affect the transaction that subsequently the defendant would purchase the same amount of liquor in value for the party paying the money, and mingle it in the common stock. This last act is that of a member of an association keeping up his *quota* of contribution to the common stock; the other is the purchase by a member of an association from its common agent, and the character and purport of the act are not changed by the subsequent contribution. It could make no difference that here the defendant was the agent of the individual members of the club acting as an unorganized body, and that in Lockyear's case the salesman was the agent of individuals acting as an organized club. If an agent is appointed by several tenants in common to dispose of real or personal property, and he does dispose of any part thereof in exchange for money, it is none the less a sale because the party paying the money and receiving such part to his own use happens to be one of the tenants in common. And it would still be a sale, although afterwards the money so received

should be invested in the purchase of similar property held by the same tenancy in common. The dealing here is simply what is known as 'co-operation,' which is an arrangement by which a member of an association procures supplies from the association at cost. The object and the effect of co-operation are, not to abolish purchases, for the member still buys from the association, but to procure supplies at cost. This transaction is necessarily either a partition in severalty to the tenant in common, or a purchase. It is clearly not a partition to each tenant in common in severalty of his undivided portion in the common stock, and it is plain that such is not the purpose and intent of the parties, for money is received in exchange, and it is to be used to obtain more liquor. Besides, the person obtaining the liquor not only does not obtain the identical liquor belonging to him, but he could very rarely, if ever, obtain his exact aliquot part unless the stock became very low. In an almost exactly similar state of facts in *State v. Essex Club*, 53 N. J. L. 99, Van Syckel, J., says: 'The liquor is not the property of the member before it is separated from the common mass and delivered to him under his promise to pay for it, but the property of the company. It is not the property of the member until after the delivery and appropriation of it by him to his own use. If he should clandestinely enter the clubhouse at night and regale himself with the liquors of the club, it would prove a very shallow defense to an indictment for larceny if he set up that he was a co-owner of the property. As well might a bank cashier, who was likewise a share-holder in the bank, set up a like plea to a charge of embezzlement. Such specious defenses have received no countenance except in prosecutions for the illegal sale of ardent spirits.' The fact specially found, that the membership of the club is 'composed of gentlemen of the highest social standing,' does not throw any light upon the transaction, except that it may be reasonably supposed that they have no desire to evade the law, and by this proceeding wish merely to procure a construction as to the legal nature of this transaction. No set of men have any special privileges under our constitution, and the parties interested must pay a license tax, if other citizens pay it, and be prohibited altogether when others are prohibited. Nor can it make any difference that no profit was intended to be realized, but that as near as possible the drinks are to be furnished at cost. Profit is not a necessary ingredient of a sale. Indeed, many sales are made at a loss. Besides, if the defendant's contention was sound, 'co-operative bar-rooms' would spring up on all sides, and the revenue act as to the sale of liquor, or the prohibition laws where they prevail, would be a nullity. If the gentlemen composing the Cosmopolitan Club of Asheville can be exempted from the license tax by the simple device of treating themselves as unorganized tenants in common of a stock of spirituous liquors, and employing an agent to furnish drinks to any of their club and their friends by selling at cost, the same can be done by any five hundred or five thousand patrons of a bar-room. The 'dealer' would simply become an 'agent,' and in lieu of profits would receive as compensation for his services a commission on purchases, or some amount out of receipts, and the money received for drinks would be invested as usual, and, as in the present case, to buy more liquor for the customer and his friends. Such an arrangement may be ingenious, but none the less a license tax is requisite to make it legal to furnish drinks in that mode."

In *State v. Horacek*, 41 Kan. 87, an incorporated club purchased beer outside the state and brought it into the state, and then sold chips to its members, each chip representing a drink or glass of beer, which was furnished

for each chip returned by a member. The beer was drank by the members as a beverage, while neither they nor the club had any license to sell intoxicating liquors, and it was decided that a member of the club who sold the chips, and a member who delivered the beer on the return of a chip, and the president of the club who was present with a knowledge of the facts, were liable to prosecution, conviction, and punishment for selling intoxicating liquors in violation of a prohibitory liquor law. Judge Valentine, in delivering the opinion of the court, said: "The defendants claim that the foregoing facts do not show or constitute any offense. It is claimed that their association was organized prior to the passage of the prohibition act, and therefore that it could not have been, and was not in fact, organized with any intention of violating that act. It is claimed that neither the society nor any one of its members ever intended to violate any law, and never has in fact violated any law; that no sale of beer or any other intoxicating liquor has ever been made by the society, or by any one of its members, as such, and that the facts stated in the agreed statement of facts do not show that any such sale has ever been made. It is claimed that the society merely purchased beer for its member, that the beer belonged to its members, and that the society merely distributed the beer in fair shares or proportions among its members, who were the owners, and that the members merely drank their own beer. We do not think that any of these points are well taken. It makes no difference that the society was organized prior to the passage of the prohibitory liquor law, for by such organization the society could not, and did not, obtain for itself or for its members any vested right to go on forever dealing in intoxicating liquors. Besides, under the law that was in force prior to the passage of the prohibition act, it was as much a violation of law to sell intoxicating liquors without a permit—then called a license—as it is now to sell intoxicating liquors without a permit. It must also be presumed that the society and its members intended to do just what they did in fact do, and if their acts constitute any offense, it must be presumed in law that they intended to commit just such any offense. From the facts stated, it must, on the other hand, be held that the society obtained its beer lawfully, and if so, then nothing but a sale of the beer, or a keeping of the same for sale, would constitute any offense. The gratuitous distribution of the beer among its members, or the giving of it away to any person, or the using of it for any lawful purpose, would not constitute an offense. But to sell the beer in any manner, directly or indirectly, would, under the other facts in this case, constitute an offense, and the disposition of it to members in the manner in which it was disposed of in the present case would, we think, constitute a sale. The beer was not distributed to or among the members in equal shares, nor was it in fact distributed to them at all except as they purchased it. Under their rules, some of the members might get all the beer and the others none. Those purchasing the chips would get beer, while the others would not get any. The sale of the chips was really a sale of the beer, as the chips represented the beer and nothing else." The remaining cases in support of the doctrine above announced are sufficiently referred to in the principal case, and the quotation from *People v. Soule*, 74 Mich. 250, inserted *supra*.

In Massachusetts, a statute declares that "all buildings or places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others shall be deemed common nuisances" in no-license towns, and provides for a special club license in license towns, authorizing the distribution of such liquors. In the case of *Commonwealth v.*

Baker, 152 Mass. 337, under an indictment against the steward of the Commercial Social Union Club, located in a no-license town, charging a violation of this statute, the evidence was not disputed that the club used its rooms for the purpose of dispensing intoxicating liquors to its members, and that defendant assisted in keeping and maintaining the rooms for that use. The court, in delivering the opinion in that case, said: "The contention for the defendant is, that the club was incorporated; that there was no evidence that it owned any intoxicating liquor, nor that any such liquor was dispensed by it except to members to whom it belonged; and that the use of its rooms for that purpose is not prohibited. The evidence for the defendant tended to prove that the rooms of the club were furnished with conveniences for storing and keeping intoxicating liquors belonging to its members, and that no such liquors were kept there except what belonged to members individually; that the rooms were used by the club to receive orders for the purchase of intoxicating liquors for members, and to keep such liquors when purchased for the members, and to serve it out to them as ordered; that the furniture and everything used in dispensing the liquor to members belonged to the club, and that all ingredients, except intoxicating liquors, which entered into any particular beverage or concoction ordered by a member, were furnished by the club. If the evidence proved nothing more, we think that it was sufficient to sustain the finding that the place was a common nuisance. A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member upon his order the liquor belonging to and kept for him, and kept the place for that purpose, the place was a common nuisance under the statute. . . . The club in the case at bar used its rooms for a purpose for which a license was required. It not only had no license, but it was in a city where such license was prohibited."

The case of *Commonwealth v. Jacobs*, 152 Mass. 276, was the trial of an indictment against the steward of the Warren Social Club, a corporation, for keeping and maintaining a common nuisance under the statute in a town where no license was granted for selling, distributing, or dispensing intoxicating liquors. The defendant was convicted, and on appeal the court said: "The evidence tended to show that the principal purpose for which the tenement was kept was to sell, distribute, or dispense intoxicating liquors. The only testimony which tended to control the inference naturally to be drawn from the circumstances was that of the defendant himself, who endeavored to show that the only persons who were accustomed to obtain liquor there were members of the club, each of whom used liquors which had been bought for him elsewhere on his personal account and as his individual property. The jury might well have disbelieved that part of the defendant's statement. There was much in the circumstances which tended to contradict him. The defendant told an officer that he ran the place. Men were found drinking from bottles on which were pasted the names of other persons. Many utensils and other articles in the room were such as the jury might have found to be the furnishings of an ordinary bar-room. At one time the defendant and another person were found handling eleven cases of lager beer, all marked with the same name. A gallon jug containing whisky was marked 'Warren Club, Worcester.' The defendant made no reply when told by the officer

that he could not find in the list of members of the club the names of Powers and Davenport, who were seen drinking there; and there was much else to throw suspicion on the defendant's story. On the whole evidence, the jury might well have believed that all the liquor on the premises was the property of the club."

The subsequent case of *Commonwealth v. Ryan*, 152 Mass. 283, was the trial of a similar indictment against the steward of the Pelican Club, and the evidence tended to show that a large quantity of intoxicating liquor and bottles were found in the rooms of the club at different times, together with fixtures commonly used in bar-rooms; that keys for lockers therein, containing liquors in bottles marked with the names of members, were in a drawer in the defendant's control; that a few of the keys opened all the lockers; that many men were found drinking there, one from a bottle marked with the name of an absent person, and a second who had been seen at another club within half an hour; that defendant attempted to hold the door when police-officers sought to enter, and gave evasive answers when asked who had charge of the place, and when arrested said, "I cannot go; I am running this place, and I can't let these men stay; if I go the men will help themselves to the liquor," and then turned down the gas, ordered the men to leave, came out of the rooms, locking the door and putting the key in his pocket. The supreme court decided that this evidence was sufficient to warrant a verdict of guilty, and that the club was a mere device to cover the sale of intoxicating liquor.

The cases which maintain the doctrine that the distribution of liquors of an intoxicating nature by a *bona fide* club among its members is not a sale within the inhibition of liquor-license laws, even though the person receiving the liquor gives money in return for it, and that a law prohibiting the sale of liquor does not apply to such a club, are *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419; *Commonwealth v. Smith*, 102 Mass. 144; *Commonwealth v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340; *Commonwealth v. Ewig*, 145 Mass. 119; *Piedmont Club v. Commonwealth*, 87 Va. 540; *Graft v. Evans*, L. R. 8 Q. B. Div. 373. Nearly all of these cases have been so ably stated and reviewed in the principal case and in the case of *People v. Soule*, 74 Mich. 250, quoted *supra*, that further reference to them here would be mere surplusage. It may be remarked, however, that the effect of the Massachusetts cases maintaining this doctrine would seem to be greatly impaired, if not entirely annihilated, so far as that state is concerned, by the passage of subsequent statutes in that state aimed directly at such clubs, and by the decisions under those statutes appearing in 152 Massachusetts Reports, and consisting of the cases of *Commonwealth v. Jacobs*, 152 Mass. 276; *Commonwealth v. Ryan*, 152 Mass. 283; *Commonwealth v. Baker*, 152 Mass. 337, — all of which are referred to above.

The case of *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419, although not expressly overruled, is apparently shorn of its effect even in that state, in consequence of the subsequent decisions in *Chesapeake Club v. State*, 63 Md. 446, and in *State v. Easton Social etc. Club*, 73 Md. 97. In passing upon the question in the former of these cases the court said: "It is argued that the case of *Seim v. State*, 55 Md. 566, has virtually settled this case. But it does not by any means follow from that decision that this case is determined. In the first place, the language of the Sunday law of 1866, under which the case of *Seim v. State* was decided, is altogether different from the act of 1882, chapter 112; for by the latter act, terms are employed more

comprehensive, especially those making the act applicable to associations and corporations, than are to be found in the Sunday law of 1866. The great object of the Sunday law is to preserve the sabbath from desecration, and in the case referred to the law was construed specially with reference to the existing license law of the state. It was thought that the case was not within the meaning of the act of 1866, because the license laws had never been applied to social clubs. In other words, because the license laws had never been construed to apply to such clubs, the Sunday law was supposed not to be intended to apply to them. Whether the reasoning was sound or unsound in the case to which it was applied, it is very clear that it can have no application whatever to this case. If it were held that the appellant is not within the purview and operation of the act of 1882, chapter 112, such construction would go far towards utterly defeating the act. For if one association or corporation could be allowed to do with impunity what the appellant has done, according to the verdict of the jury any number might be formed with the right to do the same thing; and the consequence might be that a large portion of the community would enroll themselves as members of associations or incorporated clubs to do by corporate combinations what they would not be allowed to do as individuals. Moreover, such construction, if adopted, would not only defeat the act under consideration, but it would open the door wide to the use of the same means to frustrate and defeat all the local-option laws of the state. The legislature certainly never for a moment designed that it should be in the power of any portion of the community, by combination or association, to effect an evasion and completely foil the positive mandates of the law; and no construction of the courts should give aid to the production of any such result."

The court in the latter case, while discussing the question as to whether or not the furnishing of liquor by a club to its members constituted a sale within the meaning of a prohibition law, took occasion to remark that "when the question was presented to this court in the case of *Chesapeake Club v. State*, 63 Md. 446, the judges who heard the case were equally divided in opinion, resulting in the affirmance of the ruling of the court below, which had held the club criminally liable for furnishing liquor to its members in violation of the local-option law. That case, resulting as it did, may not furnish a binding precedent or authority for the decision to be made in this; but after a careful examination and comparison of all the decisions upon the subject, we are decidedly of opinion that furnishing of liquors by the club to its members for a price fixed by regulation, and paid by the member upon receipt of the liquor, constitutes a sale, and is therefore in violation of the statute. That the revenues received by the club from the various sources mentioned in the answers become the property of the corporation, would seem to be too plain to admit of a doubt. It is with this fund, or a part of it, that the liquors are bought by the corporation, and they are kept as the property of the corporation, under its control, to be disposed of at prices fixed by it. None but members, it is true, can obtain the liquor, but they can only obtain it by paying for it; and the money thus paid goes into and constitutes a part of the funds of the corporation. The parties are competent to contract one with the other, — there being no principle to forbid a member of a corporation from contracting with or becoming a purchaser of property from the corporate body as a legal entity. And that being so, the course of dealing as between the corporation and its individual members, as stated in the answers, present all the elements of an executed contract. The corporation, being the owner of the liquor, through its appointed agent,

delivers it to the member of the corporation on his request, and receives a fixed compensation in money therefor. The property in the liquor passes to and becomes vested in the individual member, and the money paid is received for and becomes the property of the corporation. Nothing more is or can be required to constitute a completed sale. And such being the case, why should this court be astute, and indulge questionable refinements, in order to relieve these corporations of the just consequences of their acts? By holding that the supply of liquor by the club to its members in the manner admitted by the answers does not constitute a sale within the prohibition of the local-option law, we would certainly afford impunity to gross violations of the spirit and intent of the statute, and thereby open the door to all the evils intended to be suppressed by it, and that done by simply allowing a combination of individuals to do what individuals without combination could not do without incurring the penalties of the law. We think the facts admitted by the answers clearly show habitual and constant violations of the law by these corporations, by the sale of liquors at their club-rooms to the members of the club, and the fact that the sale was made without actual profit to the corporation is wholly immaterial, and affords no ground of defense to these proceedings. The case of *Seim v. State*, 55 Md. 586, has been much relied upon by the counsel for the appellees, but the distinguishing features of that case were adverted in the *Chesapeake Club* case, 63 Md. 446; and we do not think the case of *Seim* at all controlling in the decision of this case. In that case the party was indicted for selling and disposing of beer on Sunday; and it was supposed that because the license laws had never been construed to apply to social clubs, that therefore the law restraining the sale and disposition of liquor on Sunday was not intended to apply to them. But no such reasoning can apply in this case. Here the law is an unqualified prohibition to every one within the districts mentioned; and there can be no pretense that social clubs, such as the defendants in this case, were intended to be exempted from the operation of the law. The law having been violated by the defendants, the question is, whether such violation, or rather habitual violations, of law, and of duty to the public, constitute such abuse and misuse of corporate powers and franchises as to furnish legal cause for the forfeiture of the franchises and the annulment of the charter of the corporation. And of this we entertain no doubt. A corporation can no more violate a law with impunity than an individual can; and if the unlawful acts be of a nature to be detrimental to the public, and be done by and for the corporation, by its authorized agents, there is such abuse and misuse of its powers and franchises as will justify the state in recalling such corporate powers and franchises, and annulling and vacating the charter. Indeed, in many cases this is not only the appropriate but the only efficient remedy against the corporation itself."

The facts as to the organization, incorporation, rules and regulations, and method of dispensing liquor in the Maryland cases are identical with those in the principal case, and also with those in the late case of *Piedmont Club v. State*, 87 Va. 540. In the latter case the conclusion reached was in accord with the doctrine announced in the principal case, it being decided that liquors kept by a club in its rooms, and served only to its members and their invited guests, the members only paying therefor, and the money thus received being used to replenish the stock, but insufficient for that purpose, was not such a sale of liquor as requires a license under a statute providing that "any person, club, or corporation desiring to carry on the business of a retail liquor merchant, and also that of a bar-room, shall obtain a separate

license for each." The club involved in the latter case is an incorporated organization, among its objects being the promotion of social intercourse, the maintenance of a library, reading-rooms, etc. The facts are further stated as follows: "Any member may invite persons not residing in the city to visit the club, and to non-residents its hospitalities may be extended by the president for ten days; but in no case is a visitor or any person not a member of the club permitted to pay for either food, drink, or other privileges of the club. No betting of any kind is permitted. No open bar is permitted to 'treat' another member, or in any wise, directly or indirectly, pay any expense he may incur. No wine or other liquor can be furnished to members or visitors on Sunday, except as an accompaniment of a regular meal in the dining-room. No games of any kind are permitted on Sunday. The club rents and furnishes a large house, and keeps its own servants. A large number of its members make the club-house their home, except for lodging, taking all their meals there, and spend much of their time, when not engaged in business, in its parlors, library, and reading-rooms. A number of papers and periodicals are taken, and a general library is being accumulated. The club keeps, besides all the usual articles of food, which are served in its dining-rooms, a small stock of liquors, which are dispensed to its members by its steward, and other servants, at prices fixed by the board of governors. The prices are so fixed that they shall, as nearly as practicable, cover the actual cost of the articles furnished to the members for their comfort and convenience, and do not make a profit to the club. The money so received is paid into the general fund of the club, and is reinvested in like articles, which, again, are dispensed to the members. The receipts from these articles so dispensed are not sufficient to reimburse the club for the outlays necessary for their purchase and cost of service, and the deficiency has to be made good out of the funds derived from initiation fees and monthly dues. Upon these facts the jury found a verdict of guilty, which the corporation court refused to set aside, and entered judgment for the fine assessed." The court in delivering the opinion said: "The question to be determined is, whether, upon the facts above stated, the defendant club was guilty of selling liquors within the meaning of the statute. The question is of first impression in this state, but we entertain no doubt that the case is with the defendant; that is to say, that there has been no sale within the meaning of the statute. In the present case it is conceded that the defendant club is a *bona fide* club, organized for the purposes named in the charter, and not as a mere device resorted to as a means of evading the law. None but members or invited guests are entitled to the privileges of the club, and no person not a member of the club is permitted to pay for either food or drink, or other refreshments dispensed by the club. The money received for all liquors so dispensed go into the general fund, which are again used for replenishing the stock. No profit is made on the liquor. In fact, the receipts from that source are not sufficient to reimburse the club for the cost of the liquors and of serving them. The liquors so purchased, as already stated, are for the exclusive use of the members of the club and their invited guests, and what is complained of as an unlawful selling in the present case is, we think, nothing more than an equitable mode by which the cost of the liquor used by members of the club is divided amongst them in proportion to the quantity which each member uses. The case depends upon the true construction of our own statute, and we are clearly of opinion that if in the present case there can be said to have been, in the strictest or most technical sense, a sale at all, it was not such a sale as is contemplated by that statute. The

defendant club, in dispensing liquors to or at the expense of its own members, was not engaged in carrying on the business of selling liquor, and a liquor license is required of those persons only who sell or offer to sell liquor as a business."

RANDALL v. AMERICAN FIRE INSURANCE COMPANY.

[10 MONTANA, 240.]

INSURANCE — ARBITRATION — PUBLIC POLICY. — A provision in an insurance policy or other contract requiring all differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, is disregarded, as against public policy; but when such provision only requires that the value or quantity of a thing which might be involved in litigation under the contract may be ascertained and determined by arbitration, it does not oust the jurisdiction of the courts, but only exacts a certain character of evidence of a fact in controversy, and is valid.

INSURANCE — ARBITRATION — RIGHT OF ACTION. — Where an insurance policy provides that upon a failure by the parties to agree upon the amount of loss, the same shall be ascertained by appraisers, and that until the required proofs of loss are produced and the award of the appraisers obtained, the loss shall not be payable, the assured, after his proffered proofs of loss have been rejected by the insurer, without a demand for appraisal or objection to the amount of loss as shown by such proofs, may sue for the loss without first showing an appraisal, or that he has offered to have the loss appraised or requested the appointment of appraisers.

INSURANCE — ARBITRATION — PROOFS OF LOSS. — Where an insurance policy provides that upon a failure by the parties to agree upon the amount of loss, the same shall be ascertained by appraisers, and that until their award is permitted and the proof of loss produced, the loss shall not be payable, the retention by the insurer of such proof, containing a statement that the loss was estimated by parties selected by agreement between the insurer and insured, after denouncing such statement as false, in no way prejudices his rights, whether such statement is true or false.

INSURANCE — PROOF OF LOSS — INTEREST. — When, by the terms of a policy sued on, the loss is payable sixty days after proof thereof, legal interest upon the amount found due should be allowed from and after the expiration of the sixty days after proof of loss was delivered to the insured and rejected by him.

Bach and Buck, and B. P. Carpenter, for the appellant.

Toole and Wallace, for the respondents.

HARWOOD, J. The cause of action herein is founded upon an insurance policy, whereby appellant insured and agreed to indemnify respondents against loss which might happen by the destruction or damage of appellant's building, situate at Moreland, Gallatin County, Montana, known as the Moreland

Hotel, and certain furniture therein contained, by fire, to the extent of \$1,500, the sum of \$1,125 being placed upon said building, and the sum of \$375 upon the said furniture. There were also in force, during the same period, three other policies of concurrent insurance, issued by certain other companies in favor of plaintiffs upon the same property, each in the sum of fifteen hundred dollars, and distributed in like amounts on said building and furniture as aforesaid. While said insurance contracts were in force, all of said property, except a small portion of the furniture, was destroyed by fire. This action was brought to enforce payment of said fifteen hundred dollars indemnity, and the trial resulted in a judgment for plaintiffs in said sum, with interest and costs. Whereupon defendant moved for a new trial upon a statement of the case, on the ground of insufficiency of the evidence to justify the verdict, and that the same is against law, and also errors of law occurring at the trial, and excepted to by the moving party. Said motion being overruled, the case is brought up by appeal from the order overruling the same, as well as appeal from the judgment.

The insurance policy involved provides, among other conditions, as follows: "The amount of loss or damage to be estimated according to the actual value of the property at the time of the loss; and to be paid within sixty days after the loss shall have been ascertained in accordance with and within the terms and conditions of this policy, and proof of the same satisfactory to the said company shall have been made by the assured and received at the office of the company in Philadelphia. It shall be, however, optional with the company to repair, rebuild, or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, giving notice of its intention so to do within sixty days after receipt of proofs herein required; and in case the company elects to rebuild, the assured shall, if required, furnish plans and specifications of the building herein described. The assured sustaining loss by fire under this policy shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account, by separate items and proof thereof, signed and sworn to by the assured, setting forth, — 1. A copy of the written portion of this policy and all indorsements hereon; 2. Other insurance, if any, on same property, or any portion thereof, with copies of written portions of each policy and indorsements thereon; 3. The

actual cash value of the property described at the time immediately preceding the fire; 4. The ownership of the property described, and the interest of assured in same; 5. For what purposes and by whom the building herein described, or containing the property herein specified, and the several parts thereof, were used at the time of the fire; 6. The date of the loss and the amount thereof; 7. How the fire originated, as far as the assured knows or believes. The amount of sound value and of damage to the property may be determined by mutual agreement between the company and the assured; or if they fail to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail if a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of disagreement; and if the said appraisers fail to agree, they shall refer their differences to such umpire; and the award of any two, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not decide the validity of the contract, or any other question except the amount of such loss or damage." It is further provided in said policy that "the company shall have the right to take any of the articles damaged at their appraised value; and until such proofs as above required are produced and examinations and appraisals are permitted, the loss shall not be payable."

The plaintiffs, in their complaint, set up the contract of insurance, alleged the destruction of the property by fire, and "that plaintiffs' loss thereby was \$6,164 on said Moreland Hotel, and \$1,851.14 on said furniture and fixtures contained in said hotel." Plaintiffs further allege that they furnished defendant notice of said loss, and that "defendant by its adjusting agent made a personal examination into the circumstances of said loss and fire, and made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen"; that on the tenth day of September, 1887, plaintiffs and defendant did so refer the question of value of said building to arbitrators mutually agreed upon, — John Ketchum and R. W. De Noille, of Helena aforesaid, — who reported and decided the value of said building at the time of said fire to be \$7,179; "that on the fourteenth day of September, 1887, the plaintiffs furnished the defendant with proofs of said loss, and of their interest in said property, and other-

wise fully performed all the conditions of said policy on their part; that on the fifteenth day of September, 1887, the defendant returned said proofs of loss to plaintiffs and declined to pay said loss, assigning as the single ground therefor that said proofs were not satisfactory, for the reason that they referred to the estimate made by said arbitrators; that no demand has been made by defendant for a further, or any other, reference of said loss on building or furniture since said proofs of loss were so furnished; nor has defendant requested any further proofs of loss; nor did the defendant, within sixty days after receipt of proofs, give notice of their intention to rebuild or restore any of said property."

Defendant, by answer, denied the value of said building to be the sum alleged by plaintiffs, or any sum exceeding \$3,250; and denied the value of said furniture to be the sum alleged by plaintiffs, or any sum exceeding \$900; and said answer further put in issue all the allegations of plaintiffs' complaint, except the existence of said insurance policy, the destruction of said property by fire, save a small portion of the furniture, and some other allegations not necessary to notice at this time.

In addition to the specific denials of plaintiffs' allegations, defendant alleged, by way of new matter of defense, that the plaintiffs left at the office of defendant's agent in the city of Helena, while said agent was absent therefrom, on or about September 15, 1887, "some paper which falsely stated that arbitrators had been agreed upon by plaintiffs and defendant"; that plaintiffs' attention was called to this fact by defendant's agent on the same day, and thereupon plaintiffs asked permission to retain said paper, stating that said paper should not be regarded or treated as having been tendered to defendant, to which defendant, by its agent, assented. The answer further averred that plaintiffs, on or about September 14, 1887, "fraudulently and, with intent to deceive and obtain an unfair advantage over defendant in the settlement of said claim, falsely represented to defendant's agent that two persons had been agreed upon by plaintiffs and defendant, as arbitrators, to determine and decide upon the value of said building and the cost of rebuilding the same, and that such arbitrators had determined and decided that the value of said building was, at the time of the fire, \$7,179; whereas in truth and fact, as plaintiffs well knew, such persons had never been agreed upon or selected as arbitrators, and as plaintiffs well

knew, such persons had never determined as arbitrators or otherwise that said building was of the value of \$7,179, or that it would cost said sum, or any other particular sum, to rebuild the same. The answer further averred that defendant requested plaintiffs to furnish it with plans and specifications of said building so destroyed by fire, but that plaintiffs neglected and refused to furnish the same; and that no proofs, plans and specifications, declarations, or certificates have been furnished, and no examination or arbitration has been permitted or furnished by plaintiffs, or had as required by the conditions of said policy of insurance. This new matter of defense was controverted by plaintiffs' replication.

The first and main point insisted upon by appellant is, that this action is brought upon an alleged award by arbitrators, and that no evidence of value of the property destroyed, except to establish an award, was admissible. This point was raised by defendant in the lower court at the trial, and objection was made to the introduction of any evidence as to the value of the property, or the amount of said loss, except to establish an award. This objection was overruled, and the court admitted, over the objection and exception of defendant, evidence offered by plaintiffs tending to prove the allegations of the complaint as to the value of the property destroyed, and the loss sustained by plaintiffs, independent of the appraisal or award of arbitrators, as alleged in the complaint. Proof was also admitted on behalf of plaintiff in respect to the alleged submission of the question of the value of said building and plaintiffs' loss by the destruction thereof to arbitrators, and the alleged award by them made. Appellant's objection and exception aforesaid is based upon the terms of the policy and the clause which provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable." Appellant's position is, that until such appraisal and award is made by arbitrators or appraisers, chosen and acting as provided by the terms of the policy, the claim of plaintiffs is not matured for action, unless plaintiffs allege and prove that they demanded such arbitration or appraisal, and the failure to arbitrate was without the fault of plaintiffs.

Appellant further contends that plaintiffs failed to prove the selection of arbitrators or appraisers, and the appraisal by them and award of the value of the property destroyed, in the manner provided by said policy. We think,

- without doubt, plaintiffs failed in this particular; for the evidence does not show a compliance with the terms of the policy as to the selection of appraisers, or a compliance with its terms by them in appraising the property and making an award of value.

For a proper understanding of the case, and the application of our conclusion herein, it is necessary to make a brief summary of the conduct of the parties from the time the loss occurred until the action was brought. The evidence shows that immediately after said property was destroyed by fire, plaintiffs notified defendant's agent thereof by telegram. Soon after this, defendant's agent visited the place of the fire, inspected and listed the furniture saved, took rough measurements of the foundation of the building, and then proceeded to Bozeman, where he was joined by Flowers, one of the plaintiffs, who brought with him the manager who was in charge of said hotel at and previous to the time of said fire. There the plaintiff Flowers, with said agent, obtained from stores certain lists and prices of furniture bought to furnish said hotel. The manager of said hotel assisted in giving said agent information of the articles in said hotel at the time of the fire. The agent says, in his testimony: "We had Barrett (the manager of said hotel) take the rooms, one by one, and had him designate all articles of furniture in each room, and, by means of invoices which we had, put the prices of the articles. This list of articles here was obtained from Barrett, and the prices were obtained from the invoices, and these invoices were obtained at the stores in Bozeman, where the goods were bought." Said agent of defendant also testified that while Barrett was thus giving a list of the furniture in said hotel, "Flowers was occupied giving particulars of the building and the construction of it to Mr. Crook and a builder we had secured at Bozeman to make an estimate." After such inquiries, estimates, and lists were made at Bozeman, defendant's agent returned to Helena, and on the following day met said Flowers at Helena, and handed him a letter, in which said agent informed Flowers that he would "understand that the inquiries made do not in any respect supersede or waive any of the conditions or requirements of the policies; but they have the same force and call for the same full compliance as if nothing whatever had been done by us in the premises." A few days thereafter, two of the assured came to the office of the said agent, and one of them delivered to the agent a paper

intended as a proof of loss. Thereupon said agent called the assured's attention to some particulars in which said paper did not comply with the terms of the policy as a "proof of loss." One of the assured then asked said agent for a blank, used for the purpose of making proof of loss, which was furnished; then one of said assured commenced to fill up such blank, when said agent informed assured that it would be necessary to have a builder "make an estimate on the building"; and in reply to an inquiry by the assured as to names of some builders who would be competent to make such an estimate, said agent named three different builders, or firms of builders, as "reliable builders" for the assured to apply to, and engage some of them to make an estimate on the said hotel, among whom was the firm of Ketchum and De Noille. The evidence on the part of plaintiffs is to the effect that when said agent named said builders, Mr. Lounds, one of the assured, said to the agent: "Before we go further in this matter, is it understood that estimates furnished by either of these firms will be satisfactory to you?" To which the agent replied, "Yes, certainly; we have done business with all three of them." On the part of defendant, said agent testifies to the effect that he does not think Mr. Lounds asked such a question; that most of his conversation was with Mr. Flowers; that Mr. Flowers asked "a similar question," to which said agent replied that "the builders named were all reliable men, and had made estimates for us before on buildings." The assured then engaged Ketchum and De Noille, one of the firms of builders named by said agent, to make an estimate of said hotel building. Such estimate was made from details and specifications furnished by assured, and was designated as "an estimate of the cost of replacing the hotel building at Moreland." Said estimate was delivered to defendant's agent, and said agent, not being satisfied therewith, required of said builders a more detailed estimate, which was furnished. Said builders took no account of, and made no estimate upon, the furniture destroyed in said hotel. It appears by the testimony of De Noille that the estimate of said building was made principally by Ketchum, and that it was not understood by said builders that they were to act as arbitrators, and he did not understand that they acted as such. It does not appear that any "umpire" was chosen, and the record shows that said estimate was not returned "on oath." At the time said estimate was being made by said

builders, the assured had prepared what they term "proofs of loss," and the same was served on said agent. It appears that one proof of loss was made for each company having a policy in force on said property, and the four were delivered to said agent in one package. Upon examining one of said papers defendant's agent found that it contained a "clause referring to the loss of the building as estimated by Ketchum and De Noille & Co., builders selected by agreement between the agent of the company and assured to make estimates." Thereupon the agent returned all of said proofs of loss to the attorney who had delivered them for the assured. The next day said agent explained to said attorney his objection to said proofs of loss, which was that said proofs contained said clause in reference to Ketchum and De Noille having been "agreed upon." That appears to have been the only objection to said proofs asserted. Defendant's agent insisted that said clause should be stricken out, and assured refused to strike the same out.

The foregoing facts were proved without any essential conflict, and are taken principally from testimony introduced on behalf of defendant. There is a dispute between the parties to the action as to an arrangement made between the attorney of plaintiffs who delivered said proofs of loss and defendant's agent, whereby the same were retained by said attorney, with the understanding that such proofs were to be considered as not having been delivered to defendant's agent. The evidence is conflicting upon that point, therefore it is not open for consideration now.

Counsel for appellant contends that defendant would have been prejudiced and injured by the retention of said proof of loss with such objectionable clause therein; that it was justified in returning the same to assured; that the refusal of assured to strike out said objectionable clause and return said proofs was a failure to make proof of loss as required by the policy. Appellant construes said clause as an attempt, on the part of the assured, to involve defendant in an implied admission of a material statement of fact, which, in truth, never occurred, and which statement was false. We do not gather such impression from the evidence. The evidence introduced on the part of defendant alone shows a state of facts from which the assured could, in good faith, have presumed that Ketchum and De Noille were chosen, by agreement, to make the required estimates on said hotel building, although

they were not chosen as appraisers in the manner provided by the policy, nor did they proceed to make appraisement and return award strictly in the manner provided by the policy. The proof of loss in question, as shown by the record, contained no statement to the effect that Ketchum and De Noille were chosen as arbitrators or appraisers by agreement between the company and the assured, or that they made or pretended to make an appraisement or award as required by the policy. The proof contains the following statement: "Loss on building, as estimated by Ketchum, De Noille & Co., builders selected by agreement between agent of companies and assured." Under the circumstances of the selection of said builders and the making of an estimate by them, we see no evidence of fraud, trick, or deceit in the insertion of that statement in the proof of loss. Moreover, had said statement been absolutely false in fact, we do not agree with the proposition of defendant's counsel, that the retaining of said proofs of loss would have bound defendant by an implied admission of the truth of such statement, under the circumstances shown in the case. No such implied admission could arise against defendant by merely retaining such paper, after denouncing such objectionable statement as untrue, and demanding its elimination from said proof.

We return to the main question raised upon this appeal, — i. e., that "plaintiffs must recover on an award by arbitrators or appraisers, if at all." The question as to how far courts will be governed by a provision in the contract requiring that controversies arising as to the rights and liabilities of parties thereunder be submitted to arbitration has engaged the profound consideration of both American and English courts of last resort. The conclusion reached, and probably settled beyond further controversy, is, that a provision in a contract requiring all differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration will not be allowed to interfere with or bar the litigation of such controversies when brought into court. To enforce such provisions would be to allow parties to barter away the jurisdiction of courts to determine the rights of parties and redress their wrongs. Therefore such provisions are disregarded, as against public policy. But many of the same eminent authorities hold that a provision in a contract requiring that the value or quantity of a thing which might be involved in a controversy thereunder be as-

certained and determined by arbitration, or in some other possible and reasonable manner, does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in controversy. Therefore a provision in a contract like the one under consideration in the case at bar, requiring that the value of the assured property, under certain conditions, shall be ascertained by appraisal, is not disregarded as against public policy, but is upheld as valid: *Scott v. Avery*, 5 H. L. Cas. 811; *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242; *United States v. Robeson*, 9 Pet. 327; *Scottish Un. & Nat. Ins. Co. v. Clancy*, 71 Tex. 5; *Wolff v. Liverpool & L. & G. Ins. Co.*, 50 N. J. L. 453; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Old Saucelito etc. Co. v. Commercial Un. Assur. Co.*, 66 Cal. 253; *Sutro Tunnel Co. v. Segregated Bel. Min. Co.*, 19 Nev. 121; *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54.

The policy in the case at bar requires that if the parties fail to agree upon the amount of damage, "the same shall then, at the written request of either party, be ascertained by an appraisal by "competent and impartial appraisers," one to be selected by each party, and the two to select an umpire, etc. It is insisted by counsel for appellant that said clause, viewed in connection with the other provisions of the policy, and especially the clause that provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable," makes it obligatory upon the assured in this action to prove the amount of loss or damage by an appraisal obtained in the manner required by the policy, or show a fair endeavor, and failure without plaintiffs' fault, to get such an appraisal; otherwise plaintiffs' suit in court is premature, and must fail. This is claimed by defendant's counsel to be an imperative requirement of the plaintiffs, whether defendant requests such appraisal or not. There is no showing that either party requested such an appraisal. The defendant by answer expressly denies that it "made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen, or to be chosen in any other manner." The plaintiffs alleged in their complaint "that no demand has been made by the defendant for a further, or any other, reference of said loss on building or furniture or fixtures since said proofs of loss were so furnished." This allegation is not denied.

In support of their position, counsel for defendant cites cer-

tain authorities, which we will now briefly review. In the case of *Old Saucelito etc. Co. v. Commercial Un. Assur. Co.*, 66 Cal. 253, it appears from the opinion of the court that the complaint stated "facts showing that a difference arose as to the amount of loss"; "that plaintiff thereupon, and on request of defendant, chose" arbitrators, to whom was submitted "all differences of opinion as to the amount of said loss." The plaintiff further averred that the arbitrators so selected failed to agree on the amount of loss or damage, and failed to select a third person to act with them in case of disagreement, and also failed to make an award; and the plaintiff, after waiting a reasonable time, withdrew from such arbitration. But the court found on the trial that no arbitrators were chosen, and no differences as to the amount of damages were submitted to arbitrators, "and that the failure to submit such differences of opinion to arbitration was in no manner the fault or result of any action suffered or taken by defendant; but, on the contrary, defendant had always been willing to submit such differences." Upon that state of facts and the authorities it was held that plaintiff could not recover. It should be remembered that in this case the complaint alleged that differences arose as to the amount of the loss, and that defendant demanded arbitration.

In the case of *Adams v. South British etc. Ins. Co.*, 70 Cal. 198, it appears that differences arose between the company and the assured as to the amount of loss, and no demand was made by either party for an arbitration as provided in the policies. The court, referring to the case reported in 66 California, *supra*, held that until adjustment of the claim by mutual agreement, or by arbitration, or a fair effort was made by the assured to obtain such arbitration, no action could be maintained. In the case of *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 299, it appears that an arbitration was required by the policy to determine the amount of loss, in case of differences as to the same, and that such arbitration was had. But when the plaintiff brought suit he declared upon the policy generally, ignoring the award, and made no mention of the fact that an award had been obtained. It was held that the award was a necessary element of plaintiff's cause of action. The facts involved in these California cases distinguish them from the case at bar, but, in the main, appellant's position is supported by them. The case of *Lovejoy v. Hartford Fire Ins. Co.*, 11 Fed. Rep. 63, is also cited by appellant's

counsel. But that was an action by creditors of the assured to enforce payment of the loss to them. It was found that no preliminary proofs of loss had been made as required by the policies, nor was there satisfactory evidence of waiver of such proofs. So it was held by Judge Blodgett that the claims were not in such condition that the assured could maintain an action thereon, and, of course, it followed that creditors of assured could not compel payment of these claims by garnishment process. In his opinion, the learned judge, after finding that the preliminary proofs had neither been made nor waived, also mentions the provision in some of the policies before him, requiring the amount of the loss or damage to be fixed by arbitration in case of dispute, and remarks that he has no doubt that courts will enforce the provision in the future as in the past. It is plain that in this case the decision did not turn upon the question as to whether the amount of loss had been fixed by arbitration, because no preliminary proofs had been made as required by the policies, so as to reach the question of difference as to the amount of loss.

The case of *United States v. Robeson*, 9 Pet. 327, is also cited by appellant. This case affirms the general rule that where a contract provides that a certain fact, as of the transportation of certain additional freight over and above a certain quantity, shall be paid for at a given rate, on producing the certificate of the commanding officer, showing the quantity of such additional freight transported, such fact must be proved by the kind of evidence required by the terms of the contract, or the party seeking to recover must show that he has made all reasonable effort to obtain such proof, before he can be allowed to introduce other evidence of such fact. In such a case the contract does not contemplate that anything is to be done by the person obligated to pay, except to await the certificate of the party previously designated by both parties to ascertain and certify the quantity. The contract does not contemplate that the paying party shall do anything toward obtaining such certificate, nor is there any alternative contemplated whereby the parties may, under certain circumstances, dispense altogether with the necessity for such certificate, nor that it shall only be required in case of "differences" of opinion as to the amount in question, and then can only be brought into existence by the joint action of both parties in selecting arbitrators to ascertain the value as in the

case at bar. As remarked in the case last cited, *supra*, "the principles involved are connected with the fiscal action of the government." If the paying agent of the government disbursed money on other certificates or evidence other than such as the contract provided for, he did so at his own risk, for he was required to produce such certificates as the contract called for in accounting for his disbursements.

Appellant's counsel cite, as sustaining their position upon the point under consideration, *Flaherty v. Germania Ins. Co.*, 7 Ins. Law J. 226 (Pa. 1878). We have not been able to examine this case, as the report cited is not at hand; nor do we find such case in the Pennsylvania reports. But the holding of the supreme court of Pennsylvania, as announced by Mr. Justice Sharswood in *Ments v. Armenia Fire Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80, appears to be opposed to appellant's position. In that case it appears that the policy in question contained a provision for arbitration of differences as to the amount of loss, and that no action should be maintained on the policy unless the amount of loss "shall be first thus ascertained." "The defendants moved for nonsuit, 'because section 8 requires the parties to the policy to submit to a reference, etc.' Plaintiff objected to the motion because no reference was offered or asked for. By direction of the court, judgment of nonsuit was entered. This was assigned for error on the removal of the record to the supreme court by plaintiff by writ of error." The judgment was reversed.

In the case of *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, it appears there was contention as to "whether defendant had duly requested and plaintiff had unreasonably refused to submit to such an appraisal and award as the policy called for." But it is remarked by Mr. Justice Gray, in delivering the opinion of the court, that the evidence upon that question does not depend in any degree "on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties. . . . That correspondence clearly shows that the defendant repeatedly and explicitly, in writing, requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy, and that plaintiff as often peremptorily refused to do this, unless defendant would consent in advance to define the legal powers and duties of the appraisers (which defendant was under no legal obligation to do)." It was held that "the court rightly instructed the

jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy and that plaintiff, therefore, could not maintain this action." So in the case of *Gasser v. Sun Fire Office*, 42 Minn. 315, differences arose as to the amount of loss, and "the defendant duly and seasonably made a written request of said plaintiff that the amount of such damage be ascertained by an appraisal, according to the terms of the contract, and demanded that the plaintiff select and name an appraiser to act for him, and that plaintiff wholly neglected and refused to comply with such request, or to enter upon any appraisal." Under such a state of facts it was held that plaintiff must comply with defendant's request for appraisal before action could be maintained for recovery of the loss.

In the recent case of *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598, the usual arbitration clause was under consideration. Mr. Justice Bailey, in delivering the opinion of the court, says: "The instructions given enumerate, among the defenses of which the defendant was seeking to avail itself, the failure of the plaintiff to submit her difference with the defendant in relation to her loss or damage to arbitration, in accordance with the conditions of the policy, and on that question the jury were instructed as follows: 'As to the question of arbitration, you are instructed that, under the provisions of the policy, if there was a dispute as to the amount of the loss, then either party could demand an arbitration to determine the amount of such loss, by serving a notice, in writing, on the opposite party; and before you can find against the plaintiff on this point, you must believe from the evidence that there was a dispute between the parties as to the amount of the loss, and that notice in writing was served on her, or on some one authorized to act for her, demanding such arbitration in accordance with the provisions of the policy, and that she, in person or by her attorney, without sufficient cause, refused to submit to such arbitration.' It is insisted that this instruction, though holding the law substantially in accordance with the defendant's theory, is erroneous, in not conforming in its hypothesis to the evidence as it was actually given, the evidence being, as is claimed, in accordance with the hypothesis of an instruction asked by the defendant." The court held that said instruction was not erroneous. In the case of *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, after suit was brought to recover the loss, the insurance company demanded

arbitration, under a clause in the policy providing therefor, and urged said clause and demand for arbitration as a defense. The suit was commenced five months after the loss occurred. It was held that demand for arbitration came too late, and plaintiff was allowed to proceed.

In a comparatively recent case before the supreme court of Michigan (*Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338), it appears that differences had arisen between the parties as to the amount of loss. The policy in question contained an arbitration clause very much like the one in the case at bar; and although such differences had existed, as to the amount of loss, for some five months prior to the suit, no request for arbitration had been made by either party. At the trial, the defendant invoked the clause in the policy requiring arbitration, as well as another clause providing that no suit should be brought until after such arbitration was had. The trial court instructed the jury "that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and the defendant had neglected or refused to comply with the request, and thereupon further instructed the jury to return their verdict for the defendant." On appeal, this was held to be error, and the judgment was reversed. See other cases upon this subject: *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Mark v. National Fire Ins. Co.*, 24 Hun, 565, and affirmed in N. Y. Ct. of App., 91 N. Y. 663; *Hurst v. Litchfield*, 39 N. Y. 377; *Wallace v. German-American Ins. Co.*, 1 McCrary, 335; 4 McCrary, 123; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 69; *Wolff v. Liverpool etc. Ins. Co.*, 50 N. J. L. 453; *Western etc. Ins. Co. v. Putnam*, 20 Neb. 331; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Reed v. Washington etc. Ins. Co.*, 138 Mass. 572; *German-American Ins. Co. v. Steiger*, 109 Ill. 254; *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. 318; *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep. 80; *Robinson v. Georges Ins. Co.*, 17 Me. 131; 35 Am. Dec. 239.

Without further reviewing authorities, we conclude from the number examined bearing upon this important subject that the tendency now is to construe the provision found in contracts like the one before us, providing for arbitration as to differences respecting the amount of loss or damage, to mean, in contemplation of the parties, that the party desir-

ing arbitration shall request the same. In view of the numerous terms and conditions of the contract, and the position occupied by the parties, we believe this is the manifest intention. Under the terms of the policy, when a loss occurs the time for payment is fixed. Notice and verified proofs of loss are required to be presented by the assured, with other conditions as to proofs and examinations, if the insurer request them. The proofs of loss certify under oath the amount of loss as claimed by the assured. The insurer may accept this estimate, or proceed to negotiate for an adjustment or a "mutual agreement" with the assured as to the amount he will take in satisfaction of the contract, or the insurer may give notice within the required time of intention to restore the property. All these alternatives for the insurer are provided in the policy, and it is contemplated that the assured must await the movements of the insurer upon some of these lines of action. The assured cannot know which will be adopted until notified by the insurer. The insurer may also, if a difference of opinion as to the fair amount of the loss is entertained, notify the assured thereof, and request arbitration. The insurer has the amount of loss claimed by assured stated under oath, and the suggestion of "differences" in that respect must come from the insurer, and such differences ought to be certain, and would probably involve the admission of liability to pay a stated amount (*Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. 318), so that an issue would be stated to submit to arbitration. The insurer, under such a contract, is the only party who can effectually demand and bring about arbitration, or gain a defense by reason of the other party's default in failing to comply therewith. But if the assured fails to request arbitration, this deprives the insurer of no right whatever. If the insurer is deprived of the right of arbitration, it happens by his own laches. Nor by demanding arbitration can the assured bring that remedy into action, for the insurer may simply ignore such demand, and lose no defense thereby when the cause of action is taken into court. Therefore, under the peculiar conditions of the contract, it depends on the will of the insurer alone as to whether he will have arbitration or not. If he demands it in season, according to the conditions of the policy, and the conditions are shown to exist which the policy provides shall be submitted to arbitration, then the assured must accede to the request, for the courts will afford him no remedy until he submits

to arbitration: *Hamilton v. Liverpool etc. Ins. Co.*, 136 U. S. 242. But on the other hand, if the insurer is unwilling to arbitrate, he may ignore the request made by assured therefor; and under such conditions, to require the assured to make the request and plead and prove the fact is to require a vain and useless act, and the ceremony of proving it, which is always against the policy of the law.

An important circumstance in the case at bar is, that, so far as the record shows, defendant did not, at any time, signify to plaintiffs a difference of opinion as to the value of said destroyed property, or the amount of damage, as claimed by plaintiffs, or that its neglect to pay said claim was on the ground of a difference of opinion from that expressed in the plaintiffs' proof of loss as to the value of said property. As appears by the record, that point was entirely lost sight of by defendant in its contention that said clause in the proof of loss referring to Ketchum and De Noille as agreed upon to estimate the value of said building should be stricken out. Upon a careful review of the record, it is found that the only expressions by defendant of dissatisfaction as to the stated value of said property was a remark by defendant's agent to one of the assured, "that the figures seemed rather high," referring to the estimate by Ketchum and De Noille. That was before proofs of loss were made and delivered, and the evidence is produced by plaintiffs. The defendant produced no evidence of having signified to plaintiffs a difference of opinion, as to the value of the property destroyed, from that expressed in plaintiffs' proof of loss. We therefore hold that plaintiffs were not bound to show an appraisal or an award as to the amount of damages sustained; nor were plaintiffs bound to show that they had requested arbitration, and that failure to arbitrate was not through their default.

It is contended by counsel for the appellant that the court erred in instructing the jury to the effect that if the jury found that plaintiffs were entitled to recover any sum, they were also entitled to interest thereon at the rate of ten per cent per annum from and after the expiration of sixty days after proof of the loss was delivered. By the terms of the policy, the loss was payable sixty days after proof thereof. At that time the amount of loss became due. We think interest was legally allowable under our statute, as well as the authorities in such cases: Comp. Stats., 5th div., sec. 1237;

Albion Lead Works v. Citizens' Ins. Co., 3 Fed. Rep. 197; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Field v. Insurance Co. of North America*, 6 Biss. 121; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Home Ins. etc. Co. v. Myer*, 93 Ill. 271.

The further assignments of error by appellant's counsel have been carefully considered, but none of them are sustained. These assignments of error not specifically treated appear to be based upon the theory of defense set up by defendant, which we have not sustained.

It is ordered that the judgment of the trial court be affirmed, with costs.

FIRE INSURANCE — CONDITION FOR ARBITRATION OF LOSS. — As to when a condition providing for the arbitration of losses is not a condition precedent to the institution of a suit therefor, see *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720, and note; *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143. Where a fire insurance policy provides for ascertaining the amount of the loss by arbitration, upon failure to agree after proof has been furnished by the insured of the fact of loss, an allegation in a suit on the policy that the insured furnished such proof and offered to arbitrate the amount of the loss, but that the company refused such arbitration, and refused to pay the insurance or any part of it, does not show a right to resort to arbitration, or that the proof of loss was waived, or that the time of payment had expired: *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181.

FIRE INSURANCE. — CONDITION FOR ARBITRATION OF LOSSES, WHEN MAY BE WAIVED: See *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720, and note.

INSURANCE — PROOF OF LOSS — INTEREST. — Interest will be allowed on the amount recovered on a policy of fire insurance from the date of the writ only, if the amount was not made payable at a fixed time after the loss, and was not liquidated or withheld by the insurer, and no demand was made for its payment before the bringing of the action: *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143.

WATERBURY v. BOARD OF COMMISSIONERS OF DEER LODGE COUNTY.

[10 MONTANA, 515.]

ATTACHMENT — LIABILITY OF COUNTY TO GARNISHMENT. — A county is liable to garnishment for a debt due by it to its officer, under a statute declaring that all persons are subject to garnishment, that the word "person" may be applied to "bodies politic and corporate," and that counties are such bodies.

ATTACHMENT — GARNISHMENT OF COUNTY. — PUBLIC POLICY does not require that counties should be exempted from garnishment when, instead of being exempted by statute, their liability to the process is within the letter of the law.

GARNISHMENT. Action by plaintiff upon a money demand against one Hamon, deputy sheriff of Deer Lodge County. Plaintiff sued out a writ of attachment against Harnon, which was properly levied upon the sum of \$347.80 in the possession and control of said county, and belonging to and due said Harnon for salary as said deputy sheriff. Plaintiff afterwards recovered judgment against Harnon for \$210.40. Execution then issued, and was served upon said county, with similar notice of garnishment. Said county duly answered, and admitted that the amount garnished was held by it, and was owing to Harnon, but it refused to apply any part of said amount to the satisfaction of the judgment against Harnon as debtor and itself as garnishee. Judgment was rendered for the county, and plaintiff appealed.

G. B. Winston, for the appellant.

Henri J. Haskell, attorney-general, and *W. S. Shaw*, county attorney, for the respondent.

DE WITT, J. This action arose while this commonwealth was a territory of the United States, and the laws applicable to the contention are set forth in the introductory statement.

The garnishment of towns, cities, and counties has been the subject of such conflicting views in different states, and being a first impression in this court, we incline to adopt the language of Judge Welch in *City of Newark v. Funk*, 15 Ohio St. 463: "In other states authorities are quite conflicting; so much so, that we do not feel bound by any of them, and see nothing to prevent us from deciding the question as an original one, according to our own views of public policy and the meaning and intent of the statute."

This conflict to some extent, but by no means wholly, dissolves upon inspection of the statutes upon which the decisions are made. In 2 *Wade on Attachment*, secs. 345, 419, are marshaled the states holding diverse views, and the author concludes that the majority is against holding municipal corporations as garnishees. But the author doubts the soundness and questions the reason of the rule. There is eminently respectable opinion upon the other side of the question.

An analysis of the case would be interesting, but we will not enter upon it, by reason of the direct conflict of the decisions, even upon similar statutes; and furthermore, we are

of opinion that the statutes of this state are so much more explicit upon the subject under consideration, that many of the decisions of sister states are inapplicable, and that, in view of our statute, the weight of authority is not against the liability of a county as a garnishee.

It is not doubted that the statute may exempt a county from the process of garnishment. Our statute does not so exempt a county; and if they are to be exempted, the authority must be found elsewhere than in the express declaration of the statute. Again, the statute may subject a county to this process. Now, what do we find written in the law? It declares that "all persons" having in their possession or under their control any credits or other personal property belonging to the defendant, or owing debts to him, etc., shall be liable to the process. Furthermore, that the word "person" may be applied to "bodies politic and corporate," and that counties are "bodies politic and corporate." Hence counties, as "bodies politic and corporate," are brought within the meaning of the word "persons," and all persons may be garnished. It is therefore no strained conclusion to say that a county is subject to the process.

Speaking of holding a county as garnishee, Judge Biddle (*Wallace v. Lawyer*, 54 Ind. 506; 23 Am. Rep. 661) says: "And the decisions are generally made upon statutes authorizing corporations, in terms, to be garnished; yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations, or bodies politic and corporate. The words used in the statute of this state are any 'person' or 'corporation,' in general terms." But the statute of Montana, as above noticed, goes further than to use the words "persons" or "corporations," in general terms, as in Indiana, and the remarks of the judge in that case, and the authorities to which he refers, lose their force in this court.

It is a general principle that one who may be sued may be garnished by the creditor of the person who may sue. Counties with us may be sued (Gen. Laws, sec. 744), and therefore, under the general rule, they would be subject to garnishment. They, in this respect, do not come within the reason of exempting a sovereign state from garnishment, which sovereignty may not be sued, or ordinarily subjected to process.

of the courts. It being clear that the statute does not expressly exempt counties from garnishment, and it being equally clear that the letter of the statute is such that it can be reasonably applied to a county as a subject of garnishment, is there anything in the spirit of the law or the doctrine of public policy which prohibits such a construction?

We will examine, in the light of the statute, the reasons adduced for exempting counties from this process of the courts. It is objected that there is practical difficulty in summoning an artificial entity, like a county, to be examined on oath respecting its possession of property of the debtor, as provided in section 190 of the Code of Civil Procedure, and that so summoning its officers is a serious interruption to the business of the county and its officers.

We cannot agree with this view. The statute (Gen. Laws, sec. 749) expressly provides a method for service of process against a county in all legal proceedings. In another portion of the statute (sec. 72), service of a summons upon a county is provided for. Answering a garnishment is by no means as large an affair as appearing in an action as a defendant. The statute providing a method for summoning a county in legal proceedings, we can see no practical difficulty in its appearing. There was certainly none in this case, and no derangement of the county's business occurred. Again, it is said that the writ does not lie against a county by reason of its being contrary to public policy; that disasters to the public would ensue if the writ were allowed, and public servants would be impaired in their usefulness. In *Wallace v. Lawyer*, 54 Ind. 506, 23 Am. Rep. 661, it was held that a county cannot be held to answer as to its indebtedness to an execution debtor for his salary as an officer of such county in proceedings supplemental to execution. This case cites with approval *Merwin v. City of Chicago*, 45 Ill. 133, 92 Am. Dec. 204, which was a case of garnishment of a municipal corporation, in which the court, by Lawrence, J., says: "The only question presented by this record is, whether municipal corporations in this state are liable to the process of garnishment. This court held, in *City of Chicago v. Hasley*, 25 Ill. 596, that the property of such a corporation could not be levied on and sold under execution. This decision was placed upon the grounds of public policy. However strong the obligation of a town or city to pay its debts, it was considered that to allow payment to be enforced

by execution would so far impair the usefulness and power of the corporation, in the discharge of its government functions, that the public good required the denial of such a right. . . . Although this decision is not conclusive upon the question before us as *res adjudicata*, yet the entire spirit and reasoning upon which it is based must lead us to hold that a municipal corporation is not liable to process of garnishment. The question has been often before the American courts, and although the decisions are not uniform, in a large majority of the cases it has been held the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Illinois. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent on the municipal for the security of life and property, than they are on either the state or the federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation."

Thus it is observed that the 45 Ill. 133, on the subject of garnishment of a municipal corporation, adopts the reasoning of 25 Ill. 485, in the matter of an execution against the corporation, on a judgment obtained directly against the corporation. The grounds for denying an execution against a municipal corporation are most satisfactorily put in 25 Illinois, *City of Chicago v. Hasley*. The court well points out the disasters which might follow the levy of execution against the city of Chicago; how the seizure of the water-works would precipitate a water famine, the levy upon fire-engines would expose to the horrors of conflagration, and the seizure of revenues would paralyze government. To these views we have no dissent. But we cannot follow the Illinois court, in 45 Illinois, when it applies these arguments to the matter of garnishment of the municipal corporation. By garnishment the water-works, fire-engines, public buildings, and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another.

Its business is not interrupted; its property is not touched; its functions are not deranged.

Returning to the case at bar, we cannot agree that there is any reason why the great public duties of a county need be imperfectly performed, or that its business is in any danger of derangement, if it be compelled, by process of a court, to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burden cast upon it, and no duty to perform, except to act as temporary stake-holder, to await the determination of a court, in an action in which the county has no interest.

The argument of public policy as to inconvenience to the county and its officers does not reach our mind with sufficient force to impair another view of law and of right that is recognized throughout the civilized world; that is, that debtors should pay their debts. This, of course, with the modification that the means of livelihood should be left to the debtor, which view is embodied in the laws of exemption from execution, which in this state are very liberal. The debtor's earnings for thirty days prior to the levy of a writ are exempt from seizure. The servant of the county is thus secured in his support, if he earns it, and the county is not liable to lose the services of competent officers. Indeed, it has never been observed that a county has difficulty in obtaining employees to do its work, and the county may surely obtain as good service from those who pay their debts as from those who avoid such payment, and are protected in the avoidance by the unsatisfying doctrine of public policy.

We conclude that there is no substantial argument from public policy which requires us to read the law as to garnishment of counties differently from what its letter seems to us to declare. Counties are not exempted from garnishment by statute. On the contrary, their liability to the process is within the letter of the law. We find nothing in the spirit or the doctrine of public policy which induces us to add to or take from the letter. The judgment of the district court is reversed, and the cause is remanded, with directions to that court to enter judgment in favor of the plaintiff for \$210.40, and interest at the rate of ten per cent per annum from the twelfth day of March, 1888, and for the costs of this appeal.

LIABILITY OF COUNTY TO GARNISHMENT. — The general rule is, that municipal corporations are never liable to the process of garnishment: *Switzer v. City of Wellington*, 40 Kan. 250; 10 Am. St. Rep. 196, and note; *School District v. Gage*, 39 Mich. 484; 33 Am. Rep. 421; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *McLellan v. Young*, 54 Ga. 399; 21 Am. Rep. 276; *Mayor etc. of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 692, and note. Considerations of public policy will not allow a county to be subject to garnishment, unless expressly so provided by statute: *Dotterer v. Bowe*, 84 Ga. 769; and the same rule applies to a city: *First Nat. Bank v. Ottawa*, 43 Kan. 296. In the case of *City of Denver v. Brown*, 11 Col. 337, it was held that under a special statute a municipal corporation is liable to garnishment upon a judgment obtained in a district court. The principal case seems to be decided under a similar statute.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SCHMEDDING v. MAY.

[85 MICHIGAN, 1.]

MANDAMUS—INSPECTION OF COURT RECORDS. — *Mandamus* will not lie in favor of a person not a party to an action, to compel the submission for examination of the records and papers in a case, for the purpose of publishing statements in regard thereto in a newspaper before trial or hearing, or before they become public by proceedings in open court.

COURT RECORDS—RIGHT TO WITHHOLD FROM PUBLIC. — The parties to a suit may, under direction of the court, lawfully withhold the records and papers in the case, and prevent any statement in regard thereto being made public until they are made public by the consent of the parties, or by proceedings in open court.

William Look and H. F. Chipman, for the relator.

Wisner, Speed, and Harvey, for the respondent.

GRANT, J. The relator is a newspaper reporter for the Detroit Abend Post, a daily newspaper published in the city of Detroit. He prays in this proceeding for the writ of *mandamus* to compel the respondent to submit to him for inspection certain books, records, and files hereinafter specified.

The petition, after setting forth the occupation of relator, the character and business of said newspaper, and the statement that it has been customary to publish in its columns the records and proceedings of the courts of said county, contains the following: "Your petitioner further says it is the purpose and policy of said daily Detroit Abend Post, and its business, to disseminate and publish useful information and news among the people, citizens, and residents of the city of

Detroit, county of Wayne, and state of Michigan, and to publish such matters relating to the current events of the day which happen, as well in the city of Detroit as in all parts of the world, as are demanded by public curiosity, taste, and business; and it is further the purpose and intention and the policy of said daily Detroit Abend Post to publish, in brief narrative form, all and the whole of the proceedings and causes commenced and pending in the courts of the said county of Wayne, so far as the same is revealed by the files, records, proceedings, and sittings of said court, in an impartial and just manner, without desire or intention to injure or in any manner to prejudice the rights of litigants, or to express opinions upon the merits of the matters in controversy between such litigants, and thereby jeopardize or in any manner impair the rights of parties to said causes, or to attempt to influence the decrees or judgments of said court, or the verdicts or decisions of the juries impaneled in said causes, or to prevent, influence, compel, or hinder in any manner whatsoever a fair and impartial trial of any or all of the matters and things in controversy and being litigated in any cause brought before the courts of said county; and it is also the purpose of said daily Detroit Abend Post to give publicity in all legal proceedings, so far as that object can be obtained without injustice or injury to the parties immediately concerned, and at the same time to present to the public, as fully as they are presented in court, the material portions of such proceedings, and not conclusions drawn from the files, records, proceedings, and trials of causes and suits in said courts for the county of Wayne and said county clerk's office; and also to inform litigants, witnesses, and suitors of the course and stages of proceedings and trials in said courts for the county of Wayne, and of the commencement of suits, and of the names of the parties thereto, and the grounds upon which the same are brought."

The petition then alleges that the respondent is the custodian of the records, files, and books of said court; that it was the duty of the respondent to furnish the relator proper and reasonable facilities for the inspection and examination thereof; that among the books so in the custody of the respondent is an "Entry-book," containing the date of, file number, and title of each and every suit brought in said court; that upon an examination of said book, relator found the following: "Jan. 5, 1891. 11,572. Suppressed"; that he

applied to respondent to show him the files in said suit, and the calendar, but that respondent refused to do so, and would not permit relator to see and examine the records and files in said cause, or the calendar entries therein. It is unnecessary to state here the other allegations in the petition. The prayer of the petition is, that respondent furnish relator the following: 1. Proper and reasonable facilities for the examination of the record and files in said cause, so that he may make memoranda or transcripts therefrom; 2. The papers filed in said cause; 3. The files and records in said cause; 4. The books containing a record of the entries in said cause; 5. The calendar, that he may inspect the entries made therein in said cause.

The respondent admits the material facts charged in said petition, and further returns that said cause No. 11,572 was commenced by the filing of a bill of complaint, which complainant's solicitor, at the time of filing, requested to be suppressed, meaning thereby that respondent would not permit the newspaper reporters to have access thereto. The petition alleges a similar state of facts in regard to suit No. 11,439. As to this the respondent makes a similar return as above, with the further allegation that an order was subsequently made by one of the judges of the court, by which the complainant's solicitor was permitted to take the bill from the files, and had the same in his possession when the order to show cause was served. He further returns, that for some time it has been the practice, when requested by the complainant or his solicitors, to exclude the newspaper reporters from any examination of, inspection of, or from any information in relation to bills filed before answers, or proceedings taken thereon in open court, so as to make their contents known through such proceedings. The question is, therefore, fairly presented, Have parties the right to an examination of the records and papers in a cause, for the purpose of publishing statements in regard thereto in the newspapers, before trial or hearing, or before they become public by proceedings taken in open court?

The relator bases his right upon act No. 205, Laws of 1889, which provides for examination and inspection by all persons, for lawful purposes, of any "county, city, or town records." Whether the term "county records" includes the records of the circuit court of the county, *quære*. That question is not necessarily before us, and has not been argued by counsel.

The distinction appears to have been recognized in *Cowley v. Pulsifer*, 137 Mass. 392; 50 Am. Rep. 318.

After a public trial or hearing and a final determination of a cause entered upon the journal of the court, no one would probably question the right of any person to inspect that record, and publish the result. Such record has undoubtedly then become a public one. The publication of the judgment or decree is privileged, and affords no basis for an action of libel. This is clearly not so where one publishes the statements or charges made in the pleadings, and before their truthfulness has been determined by the judgment or decree of the court. In this country, courts are open to the public. It is said in *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318: "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." (An able discussion of the question here involved will be found in this case.)

But this publicity does not extend to nor include the papers filed in the case necessary to frame the issue to be tried, nor to the entries thereof made by the clerk. Such papers are usually filed and the entries made out of court. They are not proceedings in open court. These suits involve private dealings between private parties. The public are not interested to know the nature of these disputes, except it be from the feeling of idle curiosity.

But it is said that the creditors of a defendant, and those to whom he may apply for credit, are interested to know that he has been sued, and they may obtain this information through the public prints. I fail to see where there is an inherent right to publish even the fact that a man has been sued, for the purpose of warning others, and thus affect his financial standing. The claim on which suit is brought may be wholly unfounded. If the object be to obtain and publish the charges set forth in a bill for divorce, certainly the public are not interested, and their interests would undoubtedly be well subserved if the contents thereof were never published. These suits, involving private transactions, may never come

to trial or hearing. The troubles may be settled, and the charges withdrawn. In such cases there can be no objection to the papers remaining under the control of the court and the parties until such time as they choose to make them public by proceedings in open court or otherwise. The rule was well stated by the solicitor-general, in 1683, in the *quo warranto* case against the city of London, 3 Hargrave's State Trials, 553: "It is unlawful to print a man's private case while it is pending in any court of judicature, before it comes to judgment, because it is an appeal to the people; and that was my Lord Chief Justice Hale's opinion in Colonel King's case."

One very potent reason why these cases should not be published is, that in the multiplicity of morning, afternoon, and evening newspapers, a party sued may learn the fact within a short time, and avoid the service of process by leaving the jurisdiction of the court. The authorities cited by the relator in support of his position are not, in my judgment, in point, because they involve the right to examine the records in the offices of the registers of deeds, or of those officers having charge of such records, and are decided upon the provisions of the statute law applicable to each case, except in one case, which involved the right of an individual to remain in a public office from idle curiosity, while he was not interfering with the transaction of the business of the office: *O'Hara v. King*, 52 Ill. 303.

The granting of the writ being discretionary, and the sole object of the relator being to obtain, for publication, information in regard to suits which have just been commenced, and which the parties desired to keep from publication for the time being, and have been permitted to do so by the court, we do not think a case has been made requiring the granting of the writ, even if the relator had a strict legal right to the information sought.

But aside from this, our conclusion is, that the parties to suits in court may, under the direction of the court, lawfully withhold the records and papers in the case, and prevent any statement in regard thereto being made public until they are made public by the consent of the parties, or by proceedings in open court.

The respondent was evidently acting under such direction, and the writ must be denied, with costs.

COURTS — RECORDS — RIGHT OF PUBLIC TO INSPECT. — County records which are open for public inspection, and of which any person may take copies, are the records and files of the county, and not of the courts of the commonwealth within the county. Such papers are not always open to public inspection: *Cowley v. Pulsifer*, 137 Mass. 392; 50 Am. Rep. 318. See note to *Randolph v. State*, 60 Am. Dec. 764, where all the cases are collected.

TUFTS v. D'ARCAMBAL.

[85 MICHIGAN, 188.]

CONDITIONAL SALES — BREACH OF CONDITION — RIGHTS OF PARTIES.

Under a conditional sale providing that the title should remain in the seller until the purchase notes were paid, and that on non-payment of any of them at maturity the seller should have the right to take possession of the property, but not providing that this should operate as a rescission or as a forfeiture of the payments made, the taking possession by the seller upon default in payments by the buyer will not entitle the latter to rescind, or to recover the amount paid, or to a delivery of the unpaid notes, or to any lien upon the property for the amount paid by him; but upon the payment of the amount remaining due, he is entitled to a return of the property.

Osborn and Mills, for the appellant.

Irish and Knappen, for the respondent.

MCGRATH, J. This is an action of replevin. In March, 1888, plaintiff's agent took of defendant an order for certain soda-water apparatus replevined herein, which order was as follows:—

“KALAMAZOO, MICH., March 7, 1888.

“JAMES W. TUFTS, Boston, Mass.

“Forward the following described soda-water apparatus, and on receipt of bill of lading I will honor sight draft for \$——. The balance I promise to pay in monthly sums, as follows: May 10th, twenty-five dollars, and twenty-five dollars per month, with interest at four per cent from date of shipment with each payment, and for such balance and interest will execute and deliver contract notes of like tenor and form as the one printed on the back of this order, and maturing as above set forth; the delivery of said apparatus, etc., to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of James W. Tufts till paid for. [Then follows a description of apparatus.]

“E. R. D'ARCAMBAL.”

On the back of the order appears the following:—

“\$——.

188—.

“For value received, —— after date, —— promise to pay to the order of James W. Tufts —— dollars, with interest ——.

“The consideration of this and other notes is the following described soda-water apparatus, ——, which —— have received of said James W. Tufts.

“Nevertheless, it is understood and agreed by and between —— and the said James W. Tufts that the title to the above-mentioned property does not pass to ——, and that until all said notes are paid, the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of non-payment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake, immediate possession of the said property, wherever it may be, and remove the same.

“Payable at the —— Bank.

——.

“Due ——.”

The apparatus was shipped to and accepted by defendant. It was agreed between the parties that defendant should ship, and that the plaintiff should receive, to apply upon the purchase price of the apparatus, a second-hand Puffer soda-water fountain, for which he was to be allowed five hundred dollars upon the purchase price of the new fountain, and that for the balance of eleven hundred dollars he should give his notes, similar in form to that upon the back of the said order; that on March 21, 1888, the defendant executed at Kalamazoo, and forwarded to the plaintiff, forty-four notes for twenty-five dollars each, due at the rate of twenty-five dollars per month, all being in form as follows:—

“\$25.

KALAMAZOO, MICH., March 21, 1888.

“For value received, November 10, 1888, after date, I promise to pay to the order of James W. Tufts twenty-five dollars, with interest at four per cent.

“The consideration of this and other notes is the following described soda-water apparatus: One 24-10 R. form and fancy Siberian Missouri, No. 687, with water attach; three 10-gal. seamless cop. founts, — which I have received of said James W. Tufts.

“Nevertheless, it is understood and agreed by and between me and the said James W. Tufts that the title to the above-

mentioned property does not pass to me, and that until all said notes are paid, the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of non-payment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake, immediate possession of the said property, wherever it may be, and remove the same. -

“Payable at the First National Bank, Kalamazoo, Mich.

“E. R. D'ARCAMBAL,

“151 So. Burdick St.

“Due Nov. 10, 1888.”

The old apparatus was shipped to plaintiff, and credited as agreed. Ten of the notes were afterwards paid. Nine others had become due, and were unpaid, and after demand made, plaintiff took out his writ of replevin, and obtained possession of the property. All of the unpaid notes were in possession of plaintiff, and were not tendered back to defendant before the commencement of suit.

The defendant, under objection and exception, introduced evidence tending to establish the condition and value of the apparatus replevied by the plaintiff of defendant at the time thereof, and tending to prove that it had not substantially depreciated in value; and also testimony tending to show the amount of such depreciation, and the rental value of such apparatus for the time it was used by defendant.

Counsel for plaintiff requested the court to charge the jury that the plaintiff was entitled to a verdict, and that the defendant had no lien upon the property in controversy, and was not entitled to any allowance or verdict on account of the money paid by him towards the purchase price of the property over and above the depreciation of it and a fair rental for its use during the time it was in defendant's possession, or on account of the Puffer soda-water fountain received by plaintiff from him. The court declined to charge the jury as so requested, and to such refusal, counsel for plaintiff excepted; and thereupon the court, at the request of the defendant, instructed the jury that defendant had a lien upon the property, and was entitled to recover as against the plaintiff such a sum as they found from the evidence would be just between the parties, after deducting a fair amount for the rental value of the property during the time that it was in the possession of the defendant, and for any depreciation in

value it had sustained during that period; to which instruction and ruling plaintiff, by his counsel, excepted.

The jury rendered the following verdict: "That the said defendant did unlawfully detain the goods and chattels mentioned, in manner and form as the said plaintiff has in his declaration in this cause complained against him, and that they assess the damages of the said plaintiff, by reason thereof, at the sum of six cents. And they further find that the said defendant has a lien upon or special property in said goods and chattels to the amount of two hundred and fifty dollars (\$250)."

Upon this verdict the following judgment was entered: "The jury, by whom the issue joined in this cause was tried, having found by their verdict that the said defendant did unlawfully detain the goods and chattels in said plaintiff's declaration, as therein alleged, and having assessed the damages of plaintiff by reason of the unlawful detention of said goods and chattels at the sum of six cents over and above his costs and charges by him about his suit in this behalf expended, and the said jurors having further found that said defendant hath a lien upon or special property in said goods and chattels to the amount of \$250, and is not the general owner thereof, but that said plaintiff is the general owner of the said goods and chattels, subject to the lien aforesaid of said defendant,—

"Therefore it is further considered that said defendant do recover against the said plaintiff the said sum of \$250, being the amount of his special property in said goods and chattels so by the jurors in form aforesaid found, and that said defendant have execution thereof.

"And it is further considered that the said plaintiff do recover against the said defendant his costs and charges by him about his suit in this behalf expended to be taxed, and that he have execution thereof."

Plaintiff appeals, alleging the following errors: "1. The court erred in allowing the defendant to introduce evidence tending to establish the condition and value of the apparatus replevied by the plaintiff from the defendant at the time thereof, and tending to prove that it had not substantially depreciated in value, and also in permitting the defendant to introduce evidence tending to show the amount of such depreciation, and the rental value of such an apparatus for the time

it was used by the defendant, and in overruling the objections thereto made in behalf of the plaintiff.

"2. The court erred in refusing to instruct the jury that the plaintiff was entitled to a verdict, and that the defendant had no lien upon the property in controversy, and was not entitled to any allowance or verdict on account of the money paid by him towards the purchase price of the property over and above the depreciation of it, and a fair rental for its use during the time it was in defendant's possession, or on account of the Puffer soda-water fountain received by plaintiff from him.

"3. The court erred in instructing the jury that the defendant had a lien upon the property, and was entitled to recover as against the plaintiff such a sum as they found from the evidence would be just between the parties, after deducting a fair amount for the rental value of the property during the time that it was in the possession of the defendant, and for any depreciation in value it had sustained during that period.

"4. The court erred in rendering the judgment entered in said cause, in manner and form as it was rendered and entered therein."

It will be observed that the contract here does not provide for a rescission thereof before plaintiff should have the right to reduce the property to his possession, nor does it provide that the taking of possession should rescind the contract or work a forfeiture of the amount paid upon the apparatus, but the plaintiff treats the contract as still existing and executory. The contract provides expressly that the title to the property shall continue to remain in plaintiff until the apparatus is paid for, and that, in case of the non-payment of either of the notes at maturity, the plaintiff should have the right to take possession of the property; but it contains no provision that such act shall operate as a rescission of the contract, or a forfeiture of the payments thereon. The reduction of the property to possession by plaintiff does not excuse performance by defendant, as defendant has the right, upon payment of the amount due, to a return of the property. Plaintiff had the right, under the express conditions of the contract, to secure himself by taking possession, and the exercise of this right under the contract did not entitle the defendant to rescind the contract, or to a recovery of the amount paid, or to a delivery to him of the unpaid notes; neither did it give

him any lien upon the property for the amount paid by him. The court erred, therefore, in refusing to direct a verdict for plaintiff, and in instructing the jury that defendant had a lien upon the property for any amount. Plaintiff was entitled to judgment, and to his damages for the unlawful detention of his property as fixed by the jury, and to that extent the judgment below is affirmed, and reversed as to the residue, with costs of both courts to plaintiff.

CONDITIONAL SALE. — A sale of property to be paid for on installments, title to remain in seller until fully paid for, with condition that in default of such payments the property shall be returned to the seller, is a conditional sale, and the seller can recover possession of the property upon the failure of the buyer to comply with the conditions: *Gerow v. Castello*, 11 Col. 560; 7 Am. St. Rep. 260, and note; *Young v. Kansas etc. Co.*, 23 Fla. 394; *Pinkham v. Appleton*, 82 Me. 574.

BUTLER v. GRAND RAPIDS AND INDIANA R. R. Co.

[85 MICHIGAN, 246.]

PUBLIC LANDS — SURVEY — PATENT, WHAT INCLUDED WITHIN. — Where the government has surveyed its land along the bank of a navigable river, and has sold and conveyed such land by government subdivisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserved them when not surveyed. The grantee under such patent cannot be divested by a subsequent survey and grant of such unreserved islands.

PUBLIC LANDS — PATENT — EVIDENCE TO IMPRACH. — In an action by a government patentee to cancel a subsequent government patent to the same land, the complainant may show that the whole title passed to him under his patent, and that the government thereafter had no title to convey. In such cases, courts will protect purchasers from subsequent government surveys.

PUBLIC LANDS — CONFLICTING PATENTS — SUFFICIENCY OF COMPLAINT. — In an action by a government patentee to cancel a subsequent patent to part of the same land, a complaint which describes this land as a "sand-bar" or "piece of ground," and as a "piece of middle ground," and as "middle ground," is sufficient to include the term "island," when the proofs show that the land in dispute is an island.

PUBLIC LANDS — PROOF OF LOST PATENT. — Where an original patent and the record thereof have been destroyed by fire, and the legislature has made an abstract of it a public record of the same effect as the original, the grantee under such patent makes a *prima facie* proof of its contents by the introduction of such record and of a tract-book kept in the office of the register of deeds showing the same description to the same patentee.

PUBLIC LANDS — CONFLICTING PATENTS — ESTOPPEL. — A government patentee claiming land as against a subsequent patentee who has exercised acts of ownership over it is not estopped by non-claim to assert title as against persons who have never been in possession nor had any title of record.

ESTOPPEL. — **VOLUNTARY PAYMENT OF TAXES** on land by one without any record title, and without any notice to the real owner, who immediately protests in a proper manner, does not estop the latter from asserting his ownership to the land.

PUBLIC LANDS — CONFLICTING PATENTS — POSSESSION SUFFICIENT TO MAINTAIN ACTION. — Where a government patentee of land on the bank of a river claims an island lying therein as being unreserved at the time his patent was issued, as against a subsequent patentee of such island, and it appears that the first patentee has four houses upon the disputed land, in one of which he resides, and that such land has been used by his tenants for various purposes, his possession is sufficient to maintain suit to annul the subsequent patent.

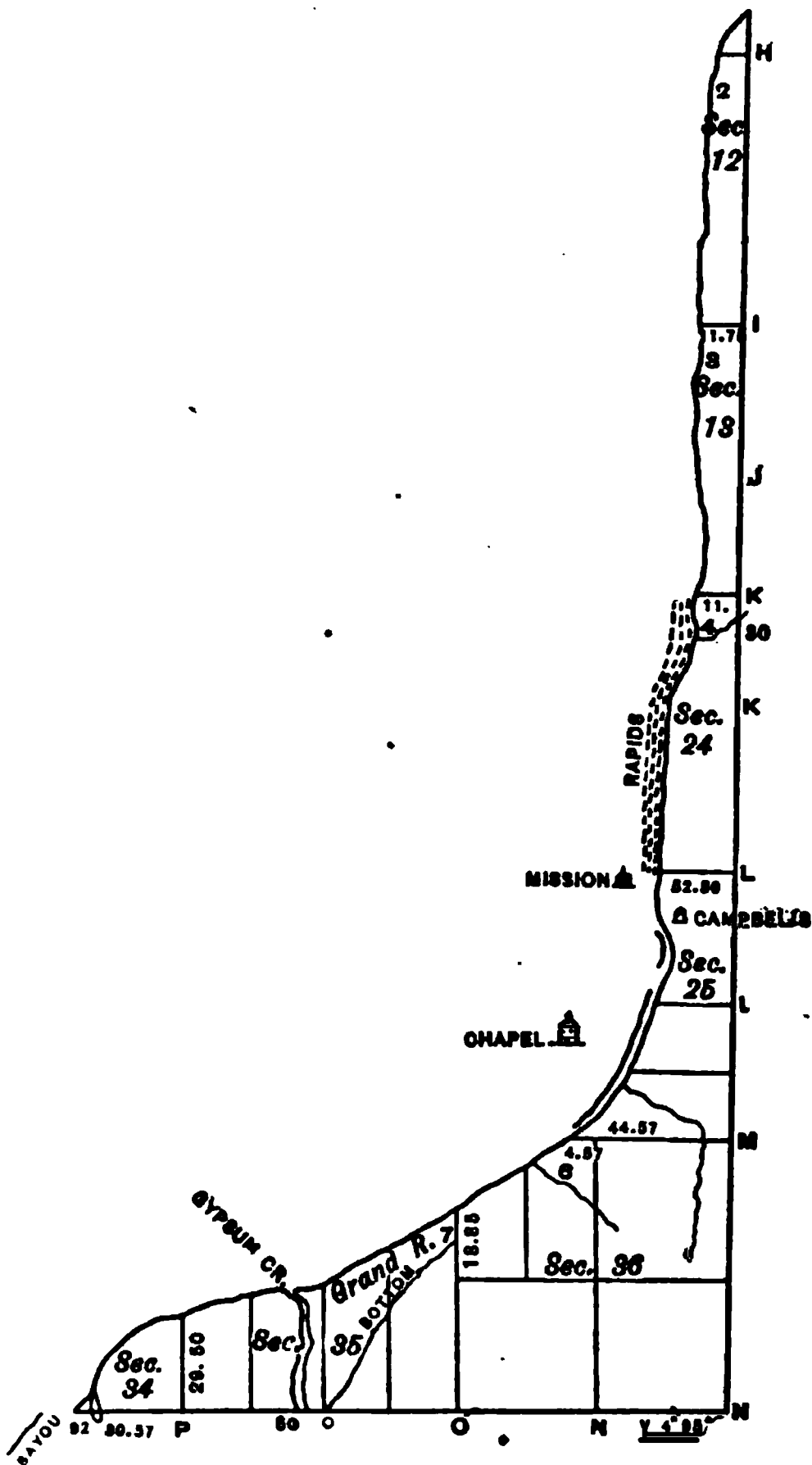
T. J. O'Brien and J. H. Campbell, for the appellants.

Butterfield and Keeney, for the respondent.

GRANT, J. Complainant is the owner of lots numbered 5, 6, 7, 8, 9, and the north half of lot 13, of Bryan and Ball's subdivision plat of the village of Kent, now part of the city of Grand Rapids. He derives his title from Lucius Lyon and E. P. Hastings, who obtained a patent from the United States November 5, 1833, for the north fractional half of the southeast quarter of section 25, township 7 north, range 12 west. This land is located on the east bank of Grand River. In this river, and opposite to that portion of section 25 lying east of the river, lay a piece of ground now known as "Island No. 5," and containing the land here in controversy. Complainant claims the land by virtue of his riparian ownership. Defendant corporation claims the land by virtue of patent from the United States. Complainant claimed actual possession, and filed this bill, claiming that defendants' alleged patent constitutes a cloud upon his title, and prays to have it declared void in so far as it affects his title. A large mass of testimony was taken as to the character of this so-called "island" at the time of the original surveys and for some years subsequent; the complainant's testimony tending to show that it was at first a low sand-bar, covered a good part of the year with water, and the defendants' testimony tending to show that it was then a well-defined island. It is immaterial to determine what the facts are as to the condition of this land in those early days, for in our judgment it is of no

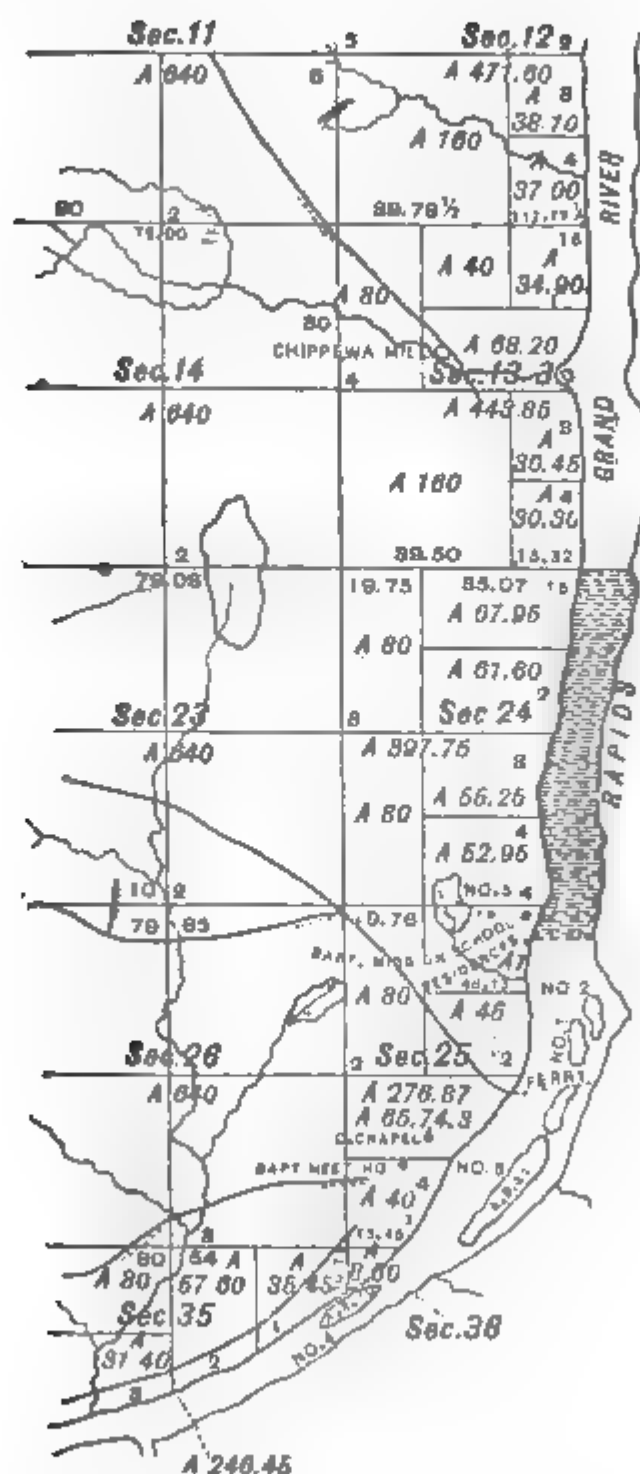
consequence whether it was what might be termed an "island" or a "sand-bar," or a "piece of low, wet ground." The law is the same in either case.

The land upon the east bank of the river was surveyed in 1831. The east bank was meandered at the same time, and so also was the west bank. Below will be found a map of that survey, as filed in the surveyor-general's office, July 7, 1831.



On February 2, 1832, another map was filed, differing only from the former in that it contained the number of acres in each subdivision, and instead of the crooked lines in the first map, evidently representing land in the river, these lines are

continued, so as to represent islands. The land upon the west side of the river was surveyed in 1887, and also four islands in the river were surveyed at the same time, and the acreage of each given. The islands then surveyed are represented upon the map of the survey filed in the surveyor-general's office April 30, 1888, a portion of which, representing the location of these islands, is given below.



The west bank of the river was again meandered at this time. The acreages of these four islands and that of the mainland are given in this survey. In surveying island No. 3, the surveyor began at the lower end of the island. The eleventh

course took him "to maple on head of island." After taking his next course from the maple, he made the following record: —

"Channel between this and Low Willow Isle 75 lks. wide and 3 ft. deep, opposite ft. of Willow Isle on left, 250 of low, wet ground on left to channel."

This "Low Willow Isle" is evidently what is now known as "Island No. 5," as changed by the action of the water.

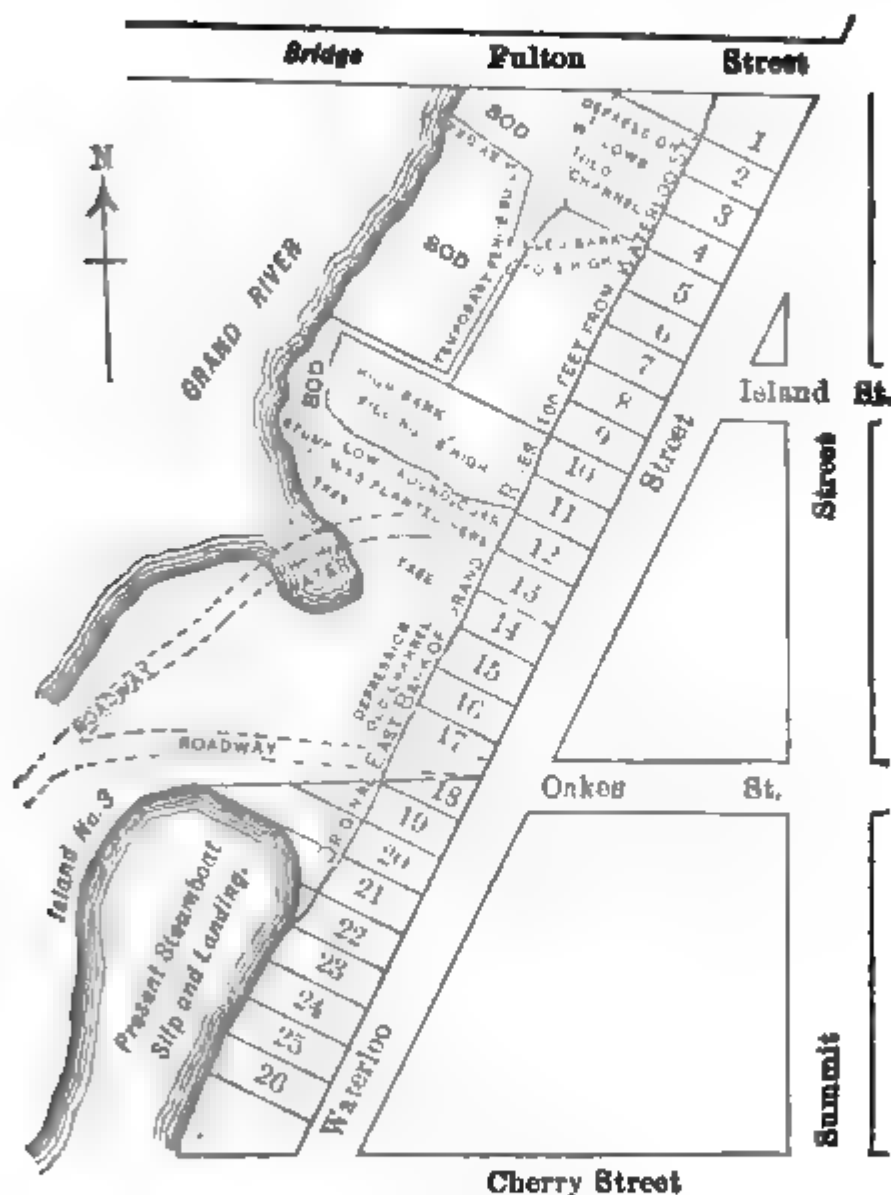
In 1856, under instructions from the surveyor-general of the United States for Ohio, Indiana, and Michigan, a deputy surveyor surveyed this land as island No. 5. In 1871 the defendant obtained a patent for it, claiming that said patent was issued under the act of Congress approved June 7, 1864, granting lands to the state of Michigan for the construction of certain railroads. This patent was not recorded till August 9, 1887, and on September 9th following, this bill was filed.

The channel between the islands and the east bank was from seventy-five to one hundred feet wide. The channel between the islands and the west bank was several times wider. The depth of the water in each was about the same. The middle thread of the river was therefore west of the islands. About the year 1836 steamboats were placed on the river, and docks were erected on the east bank, nearly opposite island No. 1. The principal business by boat was with the east side, where the city of Grand Rapids was situated. Steamboats also ran up the west channel to a steamboat warehouse on the west side of the river. About the year 1870 the east channel, opposite islands Nos. 1 and 2, was filled up, and the city constructed a sewer into and through that channel. The upper part of this channel was gradually filled, mainly by the owners of land upon the east bank. By these fillings this island has for some time been connected with and become a part of the mainland. The channel has been dredged out east of island No. 3, and a steamboat slip and landing constructed, the upper end of which is a considerable distance below island No. 5. The present situation is quite accurately shown by the map on the opposite page.

The northern end of island No. 5 extended across Fulton Street, while the southern end extended to a point nearly opposite to lot No. 16.

1. Under these facts, the principal question in controversy is, Did the original grant carry with it the title to the middle

thread of the stream? or was it limited to the east meander line thereof? It is the well-recognized rule in this state that a grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the center or middle thread of the stream, in the absence of an expressed reservation. This rule applies to grants by the United States government as well as to grants by individuals. The legal maxim must here be borne in mind, that all grants must be



construed most strongly against the grantors. To this maxim the government forms no exception. Reservations cannot be implied. When, therefore, the government has surveyed its lands along the bank of a river, and has sold and conveyed such land by government subdivisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserves them when not surveyed: *Webber v. Pere*

etc. Boom Co., 62 Mich. 626; *Fletcher v. Thunder Bay R. Boom Co.*, 51 Mich. 277; *Granger v. Avery*, 64 Me. 292; *Jones v. Soulard*, 24 How. 41; *Middleton v. Pritchard*, 8 Scam. 510; 38 Am. Dec. 112; *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 189; *St. Paul etc. R. R. Co. v. Schurmeir*, 7 Wall. 272. In these cases, the lands involved were all islands or "middle lands," and a full discussion of the principle and the authorities can there be found. It is enough for the present case to refer to the authorities which so clearly establish the principle. But we will call attention to the facts in *Granger v. Avery*, 64 Me. 292, as an illustration. January 28, 1798, the commonwealth of Massachusetts deeded to the grantors of Granger certain lands on the bank of the St. Croix River, which formed the boundary line between that commonwealth and New Brunswick. The grant made no reference to the island, which was sixteen rods wide and sixty-five rods long. September 29, 1794, the commonwealth deeded this island, known as Grass Island, to a tribe of Indians. The court held that no title passed to the Indians, because by the deed to plaintiff's grantors of the land upon the shore, the title to the island had already passed, and the commonwealth had nothing left to convey. The deed to the Indians was not recorded till June 9, 1842. The defendant Avery, claiming title from the Indians, went upon the island and cut the grass in 1854, and the plaintiff brought an action of trespass *quare clausum fregit*.

This rule of the common law does not prevail in some states, whose courts hold that where the streams are navigable, the title to the beds of the streams is in the state: *People v. Appraisers*, 33 N. Y. 461. So it is held in Iowa that navigability in fact forms the foundation for navigability in law; that the test of navigability is to be determined by use, or by public act or declaration; and that if, under this test, the stream be navigable, the boundary of the shore-owner is the high-water mark: *McManus v. Carmichael*, 3 Iowa, 1. This is also the rule in California: *Packer v. Bird*, 11 Sup. Ct. Rep. 210. But in this state, the *medium filum aquæ* of our navigable streams is the boundary of the lands of the riparian owners, whose rights, however, are servient to the use of such streams as public highways.

In the present case, there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is, that the

government agents (its surveyors) did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region.

The learned counsel for defendants assume that the government had the right to survey these islands in 1837, and thus reserve them to the government, and that it therefore had the same right in 1856. If their assumption be true, the conclusion is correct. It would then follow that the government has the right to survey any island in the river at the present time which has not been previously surveyed and sold. It would also follow that, if the government had not already surveyed and sold this island, it might now do so. Until the government has sold and conveyed its lands upon the banks of our fresh-water streams, it may of course survey any islands lying opposite them, and thus expressly reserve them out of the grant of the shore lands. The grant to Lyon and Hastings was made under the survey of 1831, by which both banks of Grand River were meandered, and by which the middle thread of the river was fixed west of this island. Under the authorities above cited, that grant clearly vested in them the title to the land in controversy. No subsequent survey by the government can deprive them of it. The government appears to have recognized this rule by discontinuing such surveys: *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139.

2. There is no force in the objection made by the defendants that this is a proceeding to cancel a patent, which can only be brought by the government itself. So far as this action is concerned, the complainant cannot raise the question whether this land was included in the act of Congress by virtue of which the defendants claim title. But in this or any similar action, it may be shown that the title had passed by a former grant, and that the government had no title to convey. In such cases courts will protect purchasers from subsequent surveys: *Webber v. Pere etc. Boom Co.*, 62 Mich. 626; *Cragin v. Powell*, 128 U. S. 691; *Burt v. Busch*, 82 Mich. 506.

3. It is insisted by the defendants that the theory of complainant's bill is, that this was not an island at the time of the original grant; that the proofs show that it was an island; and that, therefore, the complainant has made no case for

relief. We think this is too technical a construction of the rules of pleading in equity courts. It is described in the bill as a "sand-bar" or "piece of ground"; again, "a piece of middle ground," and again as "middle ground." We think this description broad enough to include the term "island," even if the proofs should justify that description. The defendants have not been prejudiced or surprised, and if the defendants were technically correct, an amendment would be granted in this court to conform to the proofs.

4. Complainant did not introduce in evidence the original patent, nor the original record of it, nor a certified copy of it. Defendants therefore insist that there is no evidence that this island was not reserved from the grant. The original patent, and the record thereof in the office of the register of deeds for the county of Kent, had been destroyed by fire. This fire occurred in 1860. There was in existence what is known as the "Scranton Abstract." This was purchased by the county of Kent, and by Act No. 315, Laws of 1865, the legislature made it a public record, and gave it the same effect as the records in the office of the register of deeds possess. This was introduced in evidence, and showed the description above given of the land conveyed by the patent to Lyon and Hastings. The tract-book kept in the office of the register of deeds for Kent County was also introduced in evidence, and showed the same description to the same grantees. The original record having been destroyed, we think the complainant made out a *prima facie* case of the contents of the patent, and that the burden of proof was then shifted to the defendants to show a reservation, if any were made.

5. Defendants insist that complainant is now estopped from asserting any claim to this island,—1. By non-claim; 2. By taxes paid by defendant; 3. By condemnation proceedings.

Within a month after the defendants had recorded their evidence of title, complainant filed this bill. The defendants had never been in possession of the property. Complainant had exercised many acts of ownership. No rights of innocent third parties here intervene. The defendants were in no position to set up the doctrine of estoppel by non-claim, when they were neither in possession nor had a title upon record.

It is a sufficient answer to the claim of estoppel by the payment of taxes to say that this was done at the express re-

quest of the agent of the defendant corporation from 1874 to 1887, without any record title, and without any notice to the complainant; that said agent at the same time claimed that other lands belonging to the railroad company were exempt from taxation; and that, immediately upon hearing of such claim, the complainant protested to the supervisor, and asserted his ownership to the center of the stream. We are cited to no case, and we think none can be found, which holds that a payment of taxes, under these circumstances, estops the owner from asserting his title.

In August, 1883, the common council took the necessary steps for opening and extending East Fulton Street from Waterloo Street, and to condemn the land necessary for that purpose. It will be seen that this street extended across the upper end of island No. 5, but which at that time had become a part of the mainland by filling in the channel. That portion of island No. 5 required for such improvement was described as follows: "So much of island No. 5 in Grand River as lies between the center line of East Fulton Street produced westerly and a line parallel therewith, and distant thirty-three feet south therefrom." Opposite the name of the owner was the following: "Grand Rapids and Indiana Railroad Company claims to be owner of fourth parcel" (meaning the parcel above described).

The jury awarded compensation and damages to the defendant railroad company in the sum of twenty-five dollars. The common council assessed the cost of the improvement upon property owners benefited, and among such owners was the defendant railroad company, assessed \$850. Defendants' counsel state in their brief that complainant had full knowledge of these proceedings, and knew of this tax assessed against the defendant railroad company. We find no such evidence upon the record, unless it is to be inferred from the notice of publication in a newspaper, which is the only proof of service of such notice contained in the record. But if complainant had been possessed of the full knowledge claimed, this could not deprive him of the title to his land. This improvement did not touch nor involve that part of island No. 5 owned by complainant. For aught that appears upon this record, the defendants might have owned the rest of island No. 5. Complainant's lots were assessed to pay for this improvement. Upon what principle can he be held estopped to assert his title by these proceedings, which did not

involve his land, and in which he was only interested as a citizen owning property in the vicinity? There was nothing upon the face of these proceedings to indicate to him that the title to any of his lands was involved, or even put in jeopardy.

6. Complainant has four houses upon the front of these lots, in one of which he lives. As already stated, the channel has been filled by him, so that the island and the mainland are now connected. It has from time to time been used by his tenants for various purposes. We think his possession sufficient to maintain his suit.

Decree affirmed, with costs.

GRANTS — LANDS BOUNDED BY A NAVIGABLE STREAM. — A grant or conveyance of land abutting upon a navigable stream vests title in the grantee to the thread of the stream. Unsurveyed islands lying between the center of a stream and lands granted by the government without any reservation vest in the grantee of such grant: *Chandos v. Mack*, 77 Wis. 573; 20 Am. St. Rep. 139, and note; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59, and note.

EVIDENCE, DOCUMENTARY — COPIES OF RECORDS OF THE LAND-OFFICE, WHEN ADMISSIBLE: See *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Barton v. Murrain*, 27 Mo. 235; 72 Am. Dec. 259; *Dikes v. Miller*, 25 Tex. 281; 78 Am. Dec. 571.

APPEAL OF LEWIS.

[85 MICHIGAN, 240.]

HUSBAND AND WIFE — JOINT DEED TO — TENANCY BY ENTIRETY — DIVORCE. — Under a joint deed to husband and wife, they take by entirety, and the estate thus created, with the right of survivorship, is not destroyed nor affected by divorce of the grantees.

Weaver and Bean, for the appellant.

Salisbury and O'Mealey, for the respondent.

GRANT, J. William W. Lewis and Nellie B. Lewis intermarried and lived together as husband and wife for some years prior to 1881, when she filed her bill for divorce. May 28, 1881, John Lewis, a brother of William, deeded to them a lot of land. The parties to the deed were described as follows: "John Lewis, of the first part, and William Lewis and Nellie B. Lewis, his wife, as husband and wife, in entirety, of the second part." The deed then conveyed "unto the said parties of the second part in entirety, as husband and wife,

and to the heirs and assigns of the survivor of them forever; to have and to hold the said premises, as described, to the said parties of the second part in entirety, to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever, in entirety."

Upon the execution of this deed the divorce proceedings were discontinued, and the parties resumed their marital relations, which they continued for some time, when she filed another bill for divorce, upon which a decree was granted her December 29, 1884. William died in May, 1885, leaving two children, the issue of said marriage. Letters of administration were duly issued upon his estate, and claims proved against it to the amount of six hundred dollars. Upon the application of the administrator, the probate court granted an order to sell the undivided one half of the lands in controversy as belonging to the estate, for the purpose of paying the debts and expenses of administration. On appeal to the circuit court, this decision was affirmed, and the case appealed to this court.

The estate created by this deed was not an estate in joint tenancy, but an estate in entirety. A joint tenancy implies a seisin *per my et per tout*, while an estate in entirety implies only a seisin *per tout*: 4 Kent's Com. 362. By the express terms of the deed the estate is declared not to be in joint tenancy, but in entirety. It is contended by the learned counsel for the appellee, that the entirety of seisin of husband and wife in real estate, with the incident right of survivorship, cannot exist independent of the legal condition of unity of person on which it rests, and that a decree of divorce, which destroys the unity of person, destroys also the entirety of seisin; that the right of survivorship is destroyed by the decree; and that the parties then become tenants in common, seised in severalty of their respective moieties. We are cited, to support this doctrine, the following authorities: Freeman on Cotenancy, sec. 76; 2 Bishop on Marriage and Divorce, 5th ed., sec. 716; *Ames v. Norman*, 4 Sneed, 696; *Harrer v. Wallner*, 80 Ill. 197; *Lash v. Lash*, 58 Ind. 526; *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 236.

Freeman and Bishop cite, as supporting their text, the case of *Ames v. Norman*, 4 Sneed, 696. In that case, decided in 1857, a creditor of the husband had levied upon his interest in the estate, which had been deeded to him and his wife. The question arose in a divorce proceeding brought by the

wife, who, in her bill, prayed that the land be decreed to her as her absolute estate. The court held that tenancy by the entirety could not exist independent of the matrimonial union; that the creditor, by his purchase, became invested with the right of the husband as it existed at the time of the sale, viz., the right to occupy and enjoy the profits of the land during the joint lives of the husband and wife, subject to the contingency that if the wife survive her former husband, his estate would then terminate. In commenting upon this case, Mr. Bishop says: "According to the Tennessee decision, the creditor took not only what was the husband's, but something, also, which was the wife's. According to the author's view, the creditor and late wife were, after the divorce, tenants in common of the land for their joint lives, with remainder to the survivor."

It matters not, perhaps, so far as the wife's interest is concerned, whether this estate be denominated one in common, joint tenancy, or entirety, so long as the right of survivorship is maintained. This may account for the fact that in some of the decisions the terms "joint tenancy" and "tenancy by the entirety" are used interchangeably, when referring to this estate. Aside from the right of survivorship, the only other interest which the husband can hold, distinct from the wife, is a sort of life interest, which some authorities have held he may convey away, and which may be seized and sold on execution: 1 Bishop on Married Women, sec. 621.

In *Harrer v. Wallner*, 80 Ill. 197, the complainant had applied for a divorce and for a partition in the same bill, claimed alimony in the land, and to have her rights in it settled between her and her husband. The case expressly holds that by the divorce the estate was changed to a tenancy in common. After referring to the statute of that state destroying joint tenancies, the court say: "The estate with the *jus accrescendi* is not being favored by our law, and the termination of the marriage relation having worked a change in the rights of the parties in the estate, the courts should rather hold that the change is rather broad enough to convert it into an estate in common than to hold that, whatever change was made, it left the right of survivorship. But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellee thereby became entitled to partition."

In *Lash v. Lash*, 58 Ind. 526, the decision in *Harrer v.*

Wallner, 80 Ill. 197, is approved, but the estate by the entirety was sustained on the ground that the grantees, husband and wife, were declared by the deed to be joint tenants, with the right of survivorship, and the heirs of the husband were held to have inherited nothing from the property.

Under these authorities, it is far from being well settled that a divorce destroys the right of survivorship. It is said in 2 Bishop on Marriage and Divorce, sec. 717: "Property settled upon the husband or wife, or held by third persons for the benefit of either, remains usually after the divorce the same as before." Also, in 1 Washburn on Real Property, 425: "If there be a divorce of the wife from the husband, she is restored to a moiety of the estate during the lives of the two, with the right of survivorship upon his death."

In *Babcock v. Smith*, 22 Pick. 61, the husband and wife conveyed her real estate to a trustee in trust for them both. The wife obtained a divorce for the misconduct of her husband, but the court held that the divorce did not change their relative rights in the land under the contract.

We see no reason in holding that a husband or wife can, by a violation of the marital obligations, obtain an interest in land which she or he does not possess while fulfilling such obligations. The common law should not, and in our judgment does not permit a person thus to profit by his own gross wrong and a violation of the most sacred obligation.

With one exception, the decisions of this court are uniform that the statute (Howell's Statutes, sec. 5561) has retained such grants to husband and wife as they exist at the common law. The doctrine in *Wait v. Bovee*, 35 Mich. 425, has no application here. In that case the right to the survivorship of personal property was alone involved, the question arising between the estates of husband and wife, both being dead. The court held that the right of survivorship did not exist, but said: "Our own decisions relative to the rights of husband and wife in case of united holdings of real estate afford no argument here."

Until the decision of *Dowling v. Salliotte*, 88 Mich. 181, decided at the last October term of this court, no doubt could reasonably have been entertained as to the character of this estate under our prior decisions. In the case of *Fisher v. Provin*, 25 Mich. 847, it was admitted by counsel that, prior to the married woman's act, the common-law rule that husband and wife receiving a joint conveyance of land took as ten-

ants by entirety was the law of Michigan. The court held "that there was nothing in the provisions of our constitution and statutes relating to the rights of married women which would convert such estate into a tenancy in common."

In *Ætna Ins. Co. v. Resh*, 40 Mich. 241, the court characterized this estate as neither a tenancy in common nor an ordinary joint tenancy, holding that in case of the death of the husband it went by survivorship to his wife. At the same term, in *Manwaring v. Powell*, 40 Mich. 371, appears the following language: "But by our statute husband and wife, under a grant made to them jointly, take by entireties"; citing *Fisher v. Provin*, 25 Mich. 347.

In the well-considered case of *Jacobs v. Miller*, 50 Mich. 124, this court reiterates the doctrine, and says that the husband and wife are seised of the entirety, and the survivor takes the whole; citing the above cases. In *Vinton v. Beamer*, 55 Mich. 561, in speaking of this estate, the court says: "It was an entirety." The same is held in *Speier v. Opfer*, 73 Mich. 38, 39, 16 Am. St. Rep. 556, decided in 1888, where the above cases are cited with approval, and in the opinion is the following language, viz.: "During the lives of both, neither has an absolute inheritable interest; neither can be said to hold an undivided half; they take by entireties; and at the death of the wife, the whole passes at once to the husband. . . . Neither has such a separate interest that he or she could sell, encumber, or devise, or which his or her heir could inherit. . . . It is an entirety in which both take the same and inseperable interest. Neither can affect the other's rights by a separate transfer."

In *Dowling v. Salliotte*, 83 Mich. 131, the result reached by the court was correct, and in accord with the decisions above cited. The wife survived the husband, and she was held to have taken by the right of survivorship. The deed did not recite that the two grantees named were husband and wife. The court held that this fact could be shown by parol evidence. It became unnecessary, in the determination of that case, to decide whether the estate conveyed was one of joint tenancy or entirety. The result would have been the same in either case. It must be freely admitted that the language of that decision, in so far as it defines the nature of this tenancy, is in direct conflict with other decisions above cited. After a very careful examination of the whole subject, our conclusion is, that the former decisions were correct, and that the case

of *Dowling v. Salliotte*, 83 Mich. 131, must, in so far as it is in conflict therewith, be overruled.

The judgment of the court below must be reversed, and judgment entered here for the appellant.

HUSBAND AND WIFE—TENANCY BY ENTIRETY. — A conveyance to a husband and his wife vests in them an estate by the entirety, in which neither can convey any interest without the assent of the other, unless their marital relation has been severed by divorce: *Engcart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note 99, 100. In estates of entirety, the survivor becomes owner of the entire estate: *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 213, and note.

CARLEY v. GRAVES.

[85 MICHIGAN, 483.]

TRUST FUND—INSOLVENT ESTATE—SETTLEMENT OF ACCOUNT. — Where a railroad company indorses a note, guaranteeing its payment at maturity, on condition that it owes the maker the amount named therein at that time, but prior thereto settles with him, and retains sufficient money to pay the note, charging it to him on its books, and crediting it to the payee, to whom it fails to pay the money as agreed, and mingles it with its own effects, after which a receiver for the railroad is appointed and its effects pass to him, the money so received by the company is not a debt in the hands of the receiver, but is a trust fund, which he is bound to pay over to the payee in the note.

B. J. Brown, for the appellant.

Sawyer and Waite, for the respondent.

CHAMPLIN, C. J. Graves was appointed receiver of the Ingalls, White Rapids, and Northern Railway Company, a corporation organized under the laws of Michigan, operating a logging-railway in Menominee County. J. H. Kiel was treasurer of the corporation before it went into the hands of the receiver.

In January, 1888, William A. Carley sold to one William Stannard a team of horses for two hundred dollars, and took a promissory note therefor, of which the following is a copy:—
“\$200. MENOMINEE, MICH., January 19, 1888.

“Ninety days after date, for value received, I promise to pay to Ingalls, White Rapids, and Northern Railway Company, or order, at the First Fational Bank of Menominee, two hundred dollars, with interest at the rate of eight per cent per annum until paid.

“WM. STANNARD.”

Said note was indorsed on the back as follows: —

“We, the I., W. R., & N. R’y Co., guarantee payment, provided the within amount is due him at the expiration of the allotted time.

“J. H. KIEL, Treasurer.”

On the 31st of March, 1888, Stannard had a settlement with the railway company, and it retained out of the amount due him \$205, which amount was charged to him on the books of the company, and William A. Carley was credited with the same amount. Carley was informed that the amount was retained by the railway company for him, and he demanded the same of the company. The company offered to give him its note, which he refused.

After the appointment of the receiver in a foreclosure suit, Carley filed his petition, praying that the receiver be ordered by the court to pay over to him the amount of principal, and interest at eight per cent, of the said note, out of the property in his hands, claiming that the said receiver held the amount as a trust fund, and not the property of the defendant company. He filed his claim in the suit against the receiver, and the receiver answered, denying that he had any money whatever in his hands as receiver belonging to Carley, and denying that any money was turned over to him as such receiver by the defendant company.

Testimony was taken in support of the claim filed, in which the facts as above delineated, as to the sale of the horses and the giving of the note and guaranty of payment, appeared; also that the company settled with Stannard, and retained from the amount due him \$205, which was charged to Stannard and credited to Carley.

The receiver was also sworn, and testified to the charges and credits as they appeared upon the books of the corporation under the date of March 31, 1888. He further testified that he did not come into possession of any money of the railway company, as receiver. It was admitted that property of the railway company came into his hands as receiver of the railway company under a bill filed to foreclose a mortgage, which property was covered by the mortgage. It further appeared that at the time of the service of the petition of Carley, the receiver had in his hands a sufficient sum in money derived from the sale of property covered by said mortgage, and from the earnings of said railroad after he took possession thereof as such receiver, to pay the claim of said Carley. It also further appeared that the mortgaged premises were sold under the

decree of the court for the sum of fifty thousand dollars, and that after the application of all the moneys in the hands of the receiver, there was a deficiency upon said sale of the sum of about forty thousand dollars.

The circuit judge, after the hearing, ordered that the receiver pay to the solicitors for the claimant the sum of \$204 out of the funds of said receivership, and the receiver has brought the matter here for review by this court.

Counsel for the petitioner, Carley, do not claim in this court to hold the railway company or its receiver in this proceeding because of any liability of it as indorser or guarantor of said note, but simply because it was intrusted with money to pay the note; and the claim is, that when Stannard settled with the company, and left with it the money to pay the Carley note, that money became a trust fund; that the petition set forth, and that the proofs show, that the money had been left with the company by Stannard with which to pay the note, with interest; that the company had failed to pay over the same, but had mingled it with the effects of the company before the appointment of a receiver; that all the effects of the company, after such mingling of the trust fund, were handed over to the receiver; and that the receiver sold the same, and realized the money thereon. And the question in the case is, whether the contention of petitioner's counsel is correct, or whether the relation between the railway company and Carley was simply that of debtor and creditor.

We do not see that the relation of debtor and creditor existed between Carley and the railway company. When Stannard settled with the railway company, he left in its hands \$205, which was due to him from the railway company, and in legal effect it was the same as if it had paid the money over to Stannard, and then he had handed it back to the company to be delivered to Carley. When it charged the amount due Stannard to him upon its books, and credited Carley with the sum of \$205, it was an appropriation of that sum of money in its hands for Carley's benefit. It held it, then, not as a creditor of Carley, but as a trust fund to be delivered over to him. And it appears from the testimony in the case that, instead of performing the trust, it has mingled the money in its hands with the assets belonging to itself, or used it for its own benefit. It cannot be specifically traced, but there is enough in the proof to warrant the inference that it has mingled the trust fund with its own individual

means, and has rendered it impossible to be specifically traced into other property in its hands, and that it has been used by the company either to pay off its debts or to increase its assets. In either case it would be to the benefit of its estate. We think the case of *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, covers the principle which ought to be applied in this case. See *Pierce v. Holzer*, 65 Mich. 272, and *Justice v. Tallman*, 86 Pa. St. 147.

The indorsement of the railway company upon the back of the note which Stannard gave to Carley, guaranteeing payment, provided the amount was due Stannard at the end of ninety days, the time which the note was to run, did not change the relation between Carley and the company so as to make it a contract relation, and the debt a simple contract debt. The guaranty was conditional, but before the time arrived Stannard made a different arrangement with the company, by which he placed in its hands the money due from him to Carley, and which it received and agreed to deliver to him (Carley).

It follows that the order appealed from must be affirmed.

TRUSTS. — Where money has been paid to a banker, to be transmitted to the party entitled thereto, and the banker dies suddenly before it is transmitted, and it is mingled with his money, his administrator must pay the same over to the owner: *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257, and note; and the same proposition is true in the case of the assignee of an insolvent corporation: *Davenport etc. Co. v. Lamp*, 80 Iowa, 722; 20 Am. St. Rep. 442.

ROUX v. BLODGETT AND DAVIS LUMBER COMPANY.

[85 MICHIGAN, 519.]

MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE MACHINERY — ASSUMPTION OF RISKS. — Where a servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances made that the danger shall be removed, the duty to remove it is manifest and imperative, and the master is not in the exercise of ordinary care, but is liable for his negligence, unless he makes his assurances good. When such assurances are made, the servant, by continuing in the employment, does not assume its risks.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. — In a case involving a question of contributory negligence, where two reasonable and different views may be taken, and men of equal candor may differ as to the liability, the question should be submitted to the jury.

B. J. Brown and H. O. Fairchild, for the appellant.

Sawyer and Waite, for the respondent.

McGRATH, J. This was case for negligence. The court below took the case from the jury on the ground that plaintiff was guilty of contributory negligence, and plaintiff appeals.

Roux was employed in defendant's saw-mill, upon the band-saw. It was his duty to take the cants from the saw, and guide them over the rollers, which took them to the gang-saw. The logs were brought to the saw from the north end of the mill, and upon a carriage-way, which extended about thirty feet to the south from the saw. Immediately east of this carriage-way, and running parallel therewith, was a system of rollers, upon which the cants fell as they were cut from the logs. The first two rollers were dead, and stood three feet and six feet, respectively, to the south of the saw, and then came an open space of four feet, and then a system of five live rollers, forming a kind of table through which the rollers projected. The power was communicated to these rollers, on the easterly ends thereof, by means of bevel-gear wheels running into each other on the horizontal shaft alongside of the table, several inches below the top of the rollers. This shaft was operated by an upright shaft, coming through the floor from below, on the top of which was a bevel-gear wheel, which worked into a similar one keyed to the horizontal shaft. The head sawyer's place was near the second dead roller, south of the saw, and plaintiff's usual place was in and upon a space between the second dead roller and the first live roller, and his duty was to bring the board or cant down upon the rollers, and guide it upon its journey to the wheel-skids, which carried it to the edger or gang-saw. These wheel-skids were on the easterly side of the rollers. The carriage which brought the logs to the saw passed back and forth with each cut in front of plaintiff, and to the west of the rollers. East of the rollers was an open space, about four feet wide, at the point where the accident occurred. When the board or cant struck the rollers it would be between plaintiff and the carriage-way.

Up to the day before the accident the gearing referred to had been covered by boards adjusted upon hinges and brackets. This covering had been split up and destroyed by the action of the boards in falling upon it and in being

carried along its surface, leaving the gearing exposed; and on the day before the accident plaintiff called the attention of the mill superintendent to this condition of the gearing, and the latter promised to attend to it that night. But when plaintiff went to the mill the next morning nothing had been done, and he again called the superintendent's attention to the exposed and dangerous condition of the gearing, and the superintendent stated that he had not had time, but that he would fix it at noon; directing plaintiff to go to work, but to take care of himself till noon, and that it would then be fixed. At about ten o'clock of the same day plaintiff had his leg crushed by having his clothing caught, and his leg drawn into the bevel-gear wheels, at the junction of the upright shaft with the horizontal shaft. These wheels moved towards each other, while the other wheels on the horizontal shaft at the rollers move from each other. When injured, plaintiff was engaged in righting a cant, which was two inches thick, somewhere from twelve to twenty-four inches in width, and about twenty-four feet long, the southerly end of which had gotten off the rollers and into the carriage-way, and plaintiff was endeavoring from the east side of the rollers to get the plank back upon the rollers. It appeared from the testimony that plaintiff was required to work rapidly; that nothing could be done at the band-saw till this plank was out of the way; that in the mean time three or four men were standing idle; and that the work at the gang-saw depended upon the progress of the work at the band-saw; and that it was not unusual for cants to require adjustment upon the rollers.

It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and by continuing his work he assumed the risk. This rule of law is not applicable to the circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not one ordinarily incident to his employment. The danger was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. In view of the danger, this very machinery had been covered up. Plaintiff, acting as a prudent man should, had, on the evening before, and again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger and of plaintiff's

exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was defendant's bounden duty, when notified, to recover this gearing. It was postponed to suit defendant's convenience, and not that of the plaintiff.

As was said in *Greene v. Minneapolis etc. R'y Co.*, 81 Minn. 248, 47 Am. Rep. 785, "if the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it."

Mr. Cooley, in his work on torts (pp. 555, 559), says: "It has been often — and very justly — remarked that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it, he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks, which he is directed by the master to assume, are to be left to rest upon his shoulders merely because he did not take upon himself the responsibility of throwing up the employment, instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know when he gave

the command that the dangers were not such or so great as the servant had apprehended. It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may, and should where practicable, come to an understanding between themselves regarding matters of this nature."

Mr. Deering on Negligence, sec. 196, says: "Where injury results, not from anything that is incident to the employment, but from a temporary peril, to which he is exposed by the negligent positive acts of the employer, he can recover."

Shearman and Redfield on Negligence, sec. 209, say the servant cannot avoid responsibility "if he continues in his work for any considerable time, knowing these facts, without being induced by his master to believe that a change will be made, and without making any complaint of such defects, or calling the attention of his master to them."

The doctrine laid down by these authors is supported by a long line of well-considered cases. In *Greene v. Minneapolis etc. R'y Co.*, 18 Minn. 248, 47 Am. Rep. 785, plaintiff was in the service of defendant as locomotive-engineer on a train running between Minneapolis and Albert Lea. On reaching the former place in the morning with his train, upon examining his engine he discovered that the chafing-irons between the engine and tender were partly broken off. He immediately reported the fact, on the repair-book, to the foreman of the round-house, whose duty it was to have the repairs made, and to direct what engine should go out. On returning in the evening to go out with his train, he found the engine out, but not repaired. On inquiring of the foreman why the

repairs had not been made, the reply, in substance, was, that he had not had time. On plaintiff's suggesting that he did not like to take out this engine, — that it was not safe, — the foreman replied that he was short of engines to do the work of the road, and had no other to send out, and added: "Proceed with that, and you can get it fixed at Albert Lea, if you have time; if not, I will remedy it when you get back." The plaintiff did so, and on the way collided with another train (for which he does not appear to be responsible), and in attempting to escape was caught between the engine and tender, the defects in the chafing-irons causing the engine to override the tender, and close up the gang-way through which he was attempting to escape.

In *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669, plaintiff was working upon a jointer which was out of repair.

In *Clarke v. Holmes*, 7 Hurl. & N. 987, plaintiff was employed to oil dangerous machinery. When he entered upon the service certain of the machinery was fenced, but the fencing became broken by accident.

In *Hough v. Texas etc. R'y Co.*, 100 U. S. 213, there was a defect in the locomotive which the deceased had in charge. "There can be no doubt," say the court, "that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

In *East Tennessee etc. R. R. Co. v. Duffield*, 12 Lea, 68, 47 Am. Rep. 319, plaintiff was supplied with a defective hammer to drive railroad spikes. He testified: "Of course, I was obliged to see that the hammer was broken. Any man who was n't blind could have seen the condition of the hammer. I knew when I saw it that it would n't do to drive spikes with, and that is why I spoke to the section-boss about it."

In *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425, a locomotive foot-board was defective, from which deceased fell while oiling the engine.

In *Parody v. Chicago etc. R'y Co.*, 15 Fed. Rep. 205, the injury was occasioned by a defective draw-bar.

In *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521, 10

Am. Rep. 417, the court say: "Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow-servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not, of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one of fact for the jury."

See also *Pieart v. Chicago etc. R'y Co.* (Iowa, 1891), 47 N. W. Rep. 1017; *Kane v. Northern Cent. R'y Co.*, 128 U. S. 91; *District of Columbia v. McElligott*, 117 U. S. 621, 631; *G., H., & S. A. R. R. Co. v. Drew*, 59 Tex. 13; 46 Am. Rep. 261; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Mehan v. Syracuse etc. R. R. Co.*, 73 N. Y. 585; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 578; 3 Am. Rep. 506; *Greenleaf v. Dubuque etc. R. R. Co.*, 83 Iowa, 52.

This principle has been recognized and approved by this court. In *Chicago and Northwestern R'y Co. v. Bayfield*, 37 Mich. 205, the servant was justified in obeying the orders of his superior. Chief Justice Cooley (p. 212) says: "The risk was not fairly upon the servant's shoulders"; and again: "We agree with the supreme court of Pennsylvania, that where a servant, in obedience to the orders of his superior, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the case is not to be regarded as one of concurring negligence"; citing *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389, 394; 18 Am. Rep. 412.

In *Swoboda v. Ward*, 40 Mich. 420, 423, the court, after laying down other general rules, say: "If, however, the servant, with full knowledge of the facts, and understanding the increased risk occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and remains in the master's employ, then he voluntarily incurs such increased risk." See also *Lytle v. Chicago etc. R'y Co.*, 84 Mich. 289.

Jones v. Lake Shore etc. R'y Co., 49 Mich. 578, recognizes the right of the servant to show that he did not consent or agree to

the change or performance of extra duties, and that he did not freely and voluntarily enter upon a discharge of new duties imposed. The new duties in that case involved extra hazard.

It is insisted, however, that the dangerous condition and character of this machinery was known to plaintiff, and that he was guilty of concurring negligence in approaching it; that he did not exercise ordinary care, and might have gone around on the other side of the rollers, and thus have avoided the danger. Knowledge of the existence of a defect or danger, while it is evidence of contributory negligence, is not conclusive. In the cases already referred to, the existence of the danger was known to plaintiff, and in all of them it is held that the question of plaintiff's contributory negligence is for the jury. In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 578, 3 Am. Rep. 506, it is said: "Inattention, which has led to a collision or a fall, if duly accounted for, or if excused or occasioned by the nature of the employment, is no hindrance to a recovery when the injury is legally imputable to a defect, without which the fall would not have occurred, or the collision would have been harmless. . . . Thus attention might be prevented by the darkness of night, or by the duty to couple cars at a particular moment, or, as is contended in this case, to separate hemp. . . . Knowledge is only one piece of evidence bearing on the question of negligence; and how much it should bear depends on all the circumstances, and is for the consideration of the jury."

In *Byerly v. Anamosa*, 79 Iowa, 204, it was held that the question of plaintiff's contributory negligence in driving a horse along a street with knowledge of conditions rendering it dangerous was for the jury, as such act was not *per se* negligence.

In *Harris v. Clinton Tp.*, 64 Mich. 447, 453, 8 Am. St. Rep. 842, the court say: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, or if plaintiff, by defendant's negligence, is placed in a situation of peril, to escape which he voluntarily incurs another danger, the defendant is liable, although the plaintiff may not, in the emergency, have pursued the course which ordinary prudence would have dictated."

In *Kane v. Northern Cent. R'y Co.*, 128 U. S. 91, the court say: "In determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position,—indeed, to all the circumstances of the particular occasion."

In *Greenleaf v. Dubuque etc. R. R. Co.*, 33 Iowa, 52, the court say: "If the service to be performed by Macy [the deceased] was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720, the superstructure or road-bed between the tracks of the defendant's road where it crossed the highway, at a point where the trains were made up, was defective. It was necessary for the person whose duty it was to unshackle the cars or to fasten them together to pass and repass over the space covered with plank between the tracks frequently, and with rapidity, and with his attention in great degree diverted from the surface over which he passed, and directed to the special duty or service of separating and uniting the cars, in order to prepare the trains for transit. While engaged in that service in the usual and ordinary mode, plaintiff was thrown down by reason of the defect in the road. The court say: "As the plaintiff was in the discharge of his duty in placing himself in a perilous position,—a duty the performance of which was known to and sanctioned by the defendants,—the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him; whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment, and on other considerations of a like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a proper subject of evidence, and should have been submitted, with proper instructions, to the jury for their determination. Nor do we think that it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had previous knowledge of the defect in the

road which caused the accident: *Reed v. Northfield*, 18 Pick. 98; 26 Am. Dec. 662; *Smith v. Lowell*, 6 Allen, 40. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it."

In *Malloy v. Walker Tp.*, 77 Mich. 448, the court say: "If it was the negligence of the defendant in not repairing the highway which placed the deceased and those under his charge in a perilous position, no negligence could be imputed to the deceased if, acting upon that occasion, as it appeared to him to be, for the safety of himself and party in his charge, he did not take the precaution which, upon consideration, a more prudent man might have taken. At least, it was a question for the jury, and fairly submitted."

Nothing short of gross negligence on the part of the injuring party can relieve the injured party from the exercise of care. The promise made by defendant in this case did not absolve plaintiff from the exercise of reasonable care while about this dangerous machinery; but what shall constitute such care in a given case must necessarily depend upon all the facts and circumstances of that case. He is held to that degree of care which every prudent man is expected to employ under similar circumstances in carrying on the same kind of business. Here the gearing had been covered, because it was dangerous in its exposed condition, and because the employees of the mill, and this very plaintiff, were likely to come into contact with it. Plaintiff remonstrated, but he was directed to continue work which involved the probability of this contact. This is but a necessary inference from the plaintiff's complaint and the superintendent's reply. The performance of plaintiff's duties required him to go into the vicinity of this machinery. His work afforded very little opportunity for deliberation. It was necessary that he should act promptly. Hesitation was not expected of him, and the degree of care required of him with respect to his own personal safety must be measured to some extent by the exactions of his employment, by its demands upon his attention, and by his devotion to its duties. His diligence and zeal in

his master's service should count in his favor, and not against him, in determining this question.

In *Harris v. Clinton Tp.*, 64 Mich. 447, 453, 8 Am. St. Rep. 842, the court say: "Upon this issue there are two reasonable but different views which might be taken, and therefore the question should have been submitted to the jury. The fact that Sopher knew the location of the highway; that it was crooked; that there were no guides or barriers; that it was overflowed, and the water had raised since he last passed over it; and knew that some hazard was incurred in attempting to pass over it,— did not conclusively show that it was negligence in him to make the attempt. Of course, the increased hazard from the rising of the water called upon Sopher to exercise increased caution, and may have been a circumstance which, in the opinion of some persons, should have determined him not to make the attempt at all; but whether it was or not, in connection with the other facts, should have been left with the jury to determine."

"Where there is a chance, upon the facts shown, for ordinary candid and intelligent men to arrive at different conclusions, the question of contributory negligence is to be determined by the jury": *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Luke v. Wheat Mining Co.*, 71 Mich. 364; *Teipel v. Hilsendegen*, 44 Mich. 461.

This is one of those cases where two reasonable and different views might be taken, and two men of equal candor might differ. In my judgment, the court below erred in taking the case from the jury, and in ruling that as a matter of law the plaintiff was guilty of contributory negligence.

The judgment will be reversed, and a new trial had, with costs of this court to plaintiff.

MASTER AND SERVANT — SERVANT REMAINING IN EMPLOYMENT, DANGEROUS IN CHARACTER, AFTER PROMISE OF MASTER TO REPAIR DEFECTIVE MACHINERY. — The general rule is, that where a servant accepts an employment with full knowledge of its risks, and continues therein after having had his attention called to the source of the accident by which he is afterwards injured, no recovery can be had against the master for such injury: *Titus v. Brulford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note; but this rule does not apply where the servant continues in the master's service after a promise by the latter to repair defects within a reasonable time, which time has not expired: *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806, and note; *Gulf etc. R'y Co. v. Donnelly*, 70 Tex. 371; 8 Am. St. Rep. 608, and note. Compare *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827, and note; *Missouri P. R'y Co. v. Williams*, 75 Tex. 4,

16 Am. St. Rep. 337; *Lytle v. Chicago etc. R. R. Co.*, 84 Mich. 239; *Rogers v. Leyden*, 127 Ind. 50.

NEGLECTOR, WHEN QUESTION FOR JURY. — When the facts are undisputed, and two reasonable persons might draw inferences from them so different that according to the conclusion reached by one there would be negligence, while that deduced by another would show exercise of ordinary care, the issue should be submitted to the jury: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note.

YEREX v. EINEDER.

[35 MICHIGAN, 24.]

WATERS—RIGHT TO DRAIN SURFACE WATER. — A land-owner has no right, under any circumstances, to reclaim his land by digging an artificial ditch and carrying the surface water thereon at once upon the land of an adjoining owner, rendering it wet and untillable, nor can such right be upheld on the ground that its exercise is an act of good husbandry.

Geer and Williams, for the appellant.

W. W. Stickney, for the respondent.

MORSE, J. The plaintiff owns the east half of the southwest quarter of section 22, township 8 north, of range 12 east, in Lapeer County. The defendant owns the west half of the same quarter, same section, township, and range. It was claimed by plaintiff that the water from the lowlands of defendant — a marsh or swamp — was diverted from its natural flow, and carried upon the lands of plaintiff, to his damage, by means of a ditch dug upon defendant's premises. The action was commenced in justice's court, where plaintiff had judgment. Upon appeal to the circuit court, verdict and judgment passed for the defendant. The plaintiff brings error.

The testimony showed that the swamp on defendant's land was a part or neck of a large swamp, which contained over three hundred acres. The natural outlet of this swamp was into Little Brook, and from thence into Mill Creek, away from plaintiff's land. The testimony on the part of the plaintiff was to the effect that although the neck of the swamp upon defendant's land came within about twenty rods of his premises, there was a ridge between such premises and the swamp, which, in the absence of the ditch, prevented any water from the swamp overflowing, even in times of high water, upon plaintiff's land. After passing this ridge, the land of defend-

ant sloped towards plaintiff's land, which, adjoining defendant's premises, was lower than the land of defendant. It was conclusively shown that there was never any natural water-course with defined banks running from the swamp to plaintiff's land, and that when the ditch was first cut through this ridge, the defendant had trouble with the grantors of plaintiff, who claimed that the ditch damaged them. The ditch was cut through this ridge by the defendant, but did not extend upon plaintiff's premises, but stopped within a few rods of his line.

It was admitted by defendant that when plaintiff bought the premises he complained of the ditch, and it was agreed by them that the county surveyor should be employed to find out in which direction the water would naturally go, and defendant promised, if the surveyor found that the water naturally, by the levels taken, would run away from plaintiff's land, that he would fill up the ditch. The surveyor so found, and the defendant filled up the ditch. But he afterwards opened it again by plowing a furrow around the edge of the swamp, and then running a dead furrow at the edge of the swamp towards plaintiff's land. This furrow was deepened and widened by the action of the water, until it became a ditch, which it is admitted carried the water from the swamp upon the plaintiff's land so quickly that it did not soak or percolate into the soil of the lowland of the defendant near the swamp, and by such ditch some acres of defendant's land were rendered tillable. There was no contradiction of the testimony of plaintiff that crops upon his land were damaged and partially destroyed by water flowing through this ditch from the swamp.

The defendant introduced testimony tending to show that, in a state of nature, the water from the neck of this swamp flowed upon plaintiff's land, especially in seasons of high water; that the defendant built a dam at the lowest place in the swamp, where this water ran towards plaintiff's land, which confined the waters more closely to the swamp; that the ditch did not quite come up to this dam, and that the water which ran into the ditch flowed around the dam, and thus reached the ditch; and that no more water went upon plaintiff's premises from the swamp, with the dam and ditch in existence, than flowed there before without them; and some of the witnesses testified that the quantity of water reaching plaintiff's land was less than it would have been had not the dam and ditch been constructed. But there was no testimony dis-

puting the fact that this ditch collected the water, and precipitated it upon plaintiff in such a manner that it prevented a large amount of it from soaking into or spreading out over defendant's land, when without the ditch the water could not reach plaintiff's premises, except as it did so by spreading out and overflowing defendant's land, and until by such spreading and overflow it reached the land of plaintiff. In other words, it is practically undisputed in the record that the digging of this ditch carried the water from this swamp in a different and unusual manner from which it possibly could have reached it naturally, and that the water thus thrown upon it damaged his land, while it reclaimed some of defendant's.

The defendant testified that he made the ditch in the first place, so that he would be enabled to work the rest of the place, — to cultivate it.

"Until I made the ditch, I could not work it. The ditch kept the water together, so that I could get a chance to work the rest of the land. . . . I could n't work it till I cut the ditch, because it would overflow the whole place. . . .

"Q. After that ditch was dug, would n't it take the water from the overflow of the swamp at once onto Yerex's land, and prevent it from overflowing on your land, and soaking him? A. Yes, sir.

"Q. And that was the object of digging the ditch, was n't it, on your part? A. Yes; that was the object on my part."

Such being the record, it was error to permit the defendant to show that the digging of this ditch was an act of good husbandry. The defendant, as said in *Gregory v. Bush*, 64 Mich. 42, 8 Am. St. Rep. 797, could not, "by artificial drains or ditches, collect the water of stagnant pools, sag-holes, basins, or ponds upon his premises, and cast them in a body upon the proprietor below him, to his injury." And he could not reclaim his land by transferring the overflow from his land to that of plaintiff. "He cannot collect and concentrate such waters, and pour them through an artificial ditch, in unusual quantities upon his adjacent proprietor": Page 44. What the defendant did, by his own showing, was to transfer his wet and untillable land to his neighbor by the digging of an artificial ditch, and carrying the water at once upon plaintiff's land, so that it would not overflow or percolate his own soil. This he had no right to do under any circumstances, and whether or not it was good husbandry upon

his part to do so was entirely immaterial. We are at a loss to understand how the jury, under the evidence and charge of the court, which was mainly correct, could have found for the defendant, unless they were prejudiced by the admission of this testimony, which had no business in the case.

The court, we also think, should have given the plaintiff's second request, as follows:—

"2. From the undisputed evidence in this case, the fact has been established that by means of the dead furrow and ditch constructed by defendant, the water has been prevented from percolating through and settling in the lowlands of defendant next to the swamp, and has been caused to flow through the dead furrow and ditch onto plaintiff's lands in quantities at times greater than it would have flowed on plaintiff's lands if there were no ditch or dead furrow, and that said plaintiff was damaged thereby, and your verdict, therefore, will be for the plaintiff."

The judgment is reversed, and a new trial granted, with costs of this court to plaintiff.

WATERS—DRAINAGE.—An upper owner may improve and drain his land for agricultural purposes, or the like, and in so doing may increase the flow of surface water in the natural channel for it; but if he diverts it from such channel, and creates a new course, by which it is discharged upon the lower proprietor at another place, he must answer for the damages caused by the diversion: *Rhoads v. Davidheiser*, 133 Pa. St. 226; 19 Am. St. Rep. 630, and note. One must not collect surface water in artificial channels and cast it upon the lands of an adjoining proprietor: *Paddock v. Somes*, 102 Mo. 226.

PEOPLE v. JOHNSON.

[86 MICHIGAN, 175.]

CRIMINAL LAW.—BREACH OF PEACE is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace.

CRIMINAL LAW.—BREACH OF PEACE.—To be intoxicated and yelling on the public streets of a village, in such manner as to disturb its good order and tranquillity, is an act of open violence and a breach of the peace, which, if committed in the presence of an officer, will justify arrest without warrant.

CRIMINAL LAW.—BREACH OF PEACE—ARREST WITHOUT WARRANT.—To authorize arrest without warrant for a breach of the peace, the offense must be committed in the presence of the officer, and the arrest made immediate. An arrest for such offense committed out of the officer's sight, and made upon information received from a third person, is unauthorized.

James J. Brown, for the appellant.

A. A. Ellis, attorney-general, and P. N. Packard, prosecuting attorney, for the people.

CHAMPLIN, C. J. Main Street, in the village of Naubinway, Mackinac County, runs east and west. A street runs north from Main Street, upon which is located the house of one Bruce. Between nine and ten o'clock of the twenty-eighth day of December, 1890, as the respondent, John Johnson, and one McAlister were walking along Main Street, Johnson "shouted" or "whooped" in a loud voice twice. The shout was heard by Frank Murry, who was marshal of the village, and who was at the time standing upon the door-step of Mr. Bruce's house. He started towards Main Street, and proceeded down that street until he came to Johnson and McAlister, and asked, "Who done that hollering?" and McAlister replied that it was Johnson, and he then arrested him for it, and attempted to take him to the jail or lock-up. Johnson resisted, and Murry used his club, and sent for Deputy-Sheriff Lull, whereupon they handcuffed Johnson, and dragged him to the jail. It is not necessary in this action to describe or comment upon the conduct of Murry while taking his prisoner to the jail, and after they arrived there.

The prosecuting attorney filed an information against Johnson for resisting the officer, Frank Murry, "while in the lawful execution of the duties of his office in attempting to arrest him, the said John Johnson, for then and there being drunk, intoxicated, disorderly, and yelling, and disturbing the public peace, in the public streets of the village of Naubinway, in the presence of him, the said Frank Murry, he, the said Frank Murry, being then and there engaged in his lawful attempts to maintain, preserve, and keep the peace," etc.

Upon trial Johnson was convicted. There was a conflict of testimony as to what occurred at the time of the arrest, but in the rulings here made we have taken the testimony of the people as that upon which the conviction must stand, if it can be supported. By Murry's testimony he was over 150 feet away, and upon another street, when he heard the shout. There is no testimony showing that he was in sight of Johnson and McAlister, nor that he knew who it was who shouted, but he based his arrest upon the statement of McAlister that it was Johnson. There was not any riot, noise, or disturbance when he reached them. No other persons are shown to have

been upon Main Street when Murry first accosted Johnson and McAlister. He had no warrant for the arrest of either Johnson or McAlister.

Under the facts above stated, two questions are raised: 1. Did Johnson, by the act of "shouting" or "whooping" in the public street of the village, when on his way home, accompanied by McAlister, at the time of night stated, commit a breach of the peace? 2. If yes, was the offense committed in the presence of the officer, Murry?

1. We have had occasion to define the substance and nature of this offense in the following cases: *Quinn v. Heisel*, 40 Mich. 576; *Way's Case*, 41 Mich. 299; *People v. Bartz*, 58 Mich. 405; *Davis v. Burgess*, 54 Mich. 514; 52 Am. Rep. 828; *Robison v. Miner*, 68 Mich. 549; *Ware v. Circuit Judge*, 75 Mich. 492. In general terms, the offense is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. Each case where the offense is charged must depend upon the time, place, and circumstances of the act.

The circuit judge instructed the jury that "to be intoxicated and yelling on the public streets of a village, in such a manner as to disturb the good order and tranquillity of that village, would be an act of open violence, and would be a breach of the peace, which, if committed in the presence of an officer, would justify him in making the arrest."

This was a correct statement of the law, and was applicable, under the testimony in this case: *Hawley on Arrest*, 88; *Moseley v. State*, 23 Tex. App. 409; *State v. Lafferty*, 5 Harr. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *State v. Freeman*, 86 N. C. 683; *City Council v. Payne*, 2 Nott & McC. 475; *State v. Bowen*, 17 S. C. 58.

2. Was the offense committed in the presence of the officer, Murry, so as to authorize him to make the arrest without a warrant? To restate the facts: Johnson was not in the view of the officer. He did not know who it was that raised the shout. He arrived at the place after the occurrence, and inquired, "Who done that hollering?" and was told by McAlister that it was Johnson, and he then arrested him. At that time Johnson was not engaged in making any noise or disturbance. At the time the officer heard the shout he was over 150 feet away, upon another street. It was not in his presence, and when he arrived, there was perfect tranquillity.

To authorize an arrest without a warrant, the offense must be committed in the presence of the officer, and the arrest must be made immediately. The officer did not act upon his own knowledge, but upon information he had gained by inquiries from McAlister. If he could make the arrest under such circumstances without a warrant, then there is no reason why he could not have made it the next day, or a week after, upon inquiry and information that Johnson was the person whom he heard shouting.

People v. Bartz, 53 Mich. 493, is cited as supporting the proposition that the offense was committed in the presence of Murry. The facts in that case were different from the facts in this. In that case the officer who made the arrest saw the flash made when the pistol was discharged, heard the report and saw the respondent, Bartz, and pursued and arrested him. Bartz had not been out of sight of the officer from the time he discharged the pistol until the officer overtook and arrested him.

It is claimed by counsel for the people that Johnson, being intoxicated in a public street, was liable to be arrested therefor, without warrant, under Act No. 4, Laws of 1887 (3 Howell's Stats., sec. 9314 i), and section 2893, Howell's Statutes. But this position is one taken in this court for the first time. The case was tried below upon the charge and theory that Murry made the arrest for a breach of the peace. The officer made the arrest for that offense, as is apparent from his inquiry of Mr. McAlister. He did not inform Johnson that he arrested him for being intoxicated, and does not testify that he was intoxicated. McAlister is the only one who testified that Johnson was intoxicated, and that he was taking him home. The judge put the case to the jury upon the theory that the arrest was made for committing a breach of the peace, and the people will not be permitted, after trial and conviction of respondent upon that theory, to change ground, and claim that he was arrested for being intoxicated under the act cited.

The conviction must be set aside, and the prisoner discharged.

CRIMINAL LAW — BREACH OF PEACE. — As to what will constitute a breach of peace, see *State v. Archibald*, 59 Vt. 548; 59 Am. Rep. 755; *Davis v. Burgess*, 54 Mich. 514; 52 Am. Rep. 828; *State v. Burnham*, 56 Vt. 445; 48 Am. Rep. 801; *Commonwealth v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375. The use of foul and abusive language in a dwelling-house, to the occupants

thereof, causing no fear of bodily harm, is not a common-law breach of the peace: *Ware v. Loveridge*, 75 Mich. 488.

ARREST WITHOUT WARRANT. — A constable, by virtue of his office, without a warrant, may arrest any person disturbing the peace in his presence: *Commonwealth v. Tobin*, 108 Mass. 426; 11 Am. Rep. 375; *Leighton v. Hall*, 31 Ill. 108; 83 Am. Dec. 205, and note; *Stats v. Hunter*, 106 N. C. 796; *Murcos v. Commonwealth*, 86 Va. 443; *Webb v. State*, 51 N. J. L. 189.

WERBOWLSKY v. FORT WAYNE AND ELMWOOD RAILWAY COMPANY.

[86 MICHIGAN, 286.]

NEGLIGENCE IS NOT PRESUMED FROM FACT OF ACCIDENT. — There must have existed, before its occurrence, some suggestion of danger, in order to create liability for negligence.

NEGLIGENCE. — USE OF APPLIANCES in universal and common use for the same purpose is not negligence. Nor can it be said that the mode of construction of a street-car is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of the passenger or the company.

NEGLIGENCE — STREET-CAR PASSENGER. — A passenger who voluntarily jumps on or off a street-car while it is in motion does so at his own peril, and that construction of the car is not defective which is only unsafe in view of such conduct.


NEGLIGENCE — DUTY OF STREET-CAR COMPANY. — Street-car companies must allow their patrons an opportunity to get on and off the cars, and the starting of a car while either is being done is negligence, no matter what the construction of the car; but such act does not make that defective which under other circumstances is reasonably safe.

Orla B. Taylor and Edwin F. Conely, for the appellant.

Washington I. Robinson, for the respondent.

MCGRATH, J. This is an action on the case to recover damages for injuries which plaintiff claims to have suffered while a passenger on one of the defendant's street-cars, through the defendant's negligence. Plaintiff recovered in the court below, and the defendant appeals.

Plaintiff was a passenger on one of defendant's cars, and claims that, having signaled the conductor to stop the car, and after the car had stopped, the plaintiff undertook to alight, when the car started suddenly, and threw him to the ground; that in falling, his foot caught in a hole in the step, and he was dragged some distance. Defendant denies this story, and insists that plaintiff undertook to get off when the car was in motion.

The car was an open car, with seats running crosswise of the car, and with a foot-board about eight or ten inches wide. The foot-board is about six or eight inches below the floor of the car. On the inside edge of this foot-board is a shoe, or riser, about three or four inches high. The box or bed of the car rests upon the outer ends of the axles, upon heavy spiral springs, which are about six inches in length, the upper ends of which are attached to the car, and the lower ends are affixed to castings, into which the axles run. The shape of the upper surface of these castings is as follows:  The springs occupy positions marked "a, a." On each side of the car there are two openings in the riser, opposite the wheels. The face of the risers is flush with the outside edge of the car-bed, and the springs come out flush with the face of the risers. The face of the wheels is six or eight inches from the inside edge of the step or foot-board. There are therefore two openings in the riser, between the springs, on each side of the car, which are each about twelve inches long and about six or eight inches deep between the car-bed and the lower surface of the castings. The foot-board is generally about even with the lower surface of the castings. It would be almost impossible for a passenger in entering or alighting from a car to put his foot into this opening in such a way as to injure it, or admit of its being caught, although it may be possible that one falling from the foot-board might get his foot caught therein. There was no testimony offered upon the trial tending to show that these opening are unnecessary, or improper, or dangerous, or defective, or not properly guarded, or that the cars were not reasonably safe, or that the defendant had not used reasonable caution in adopting the style of car that it had adopted, but there was testimony that similar cars with similar openings were in general use.

The jury were permitted to view the car in question, and the court instructed the jury as follows: "If you think, gentlemen of the jury, that it was negligence, having seen the car in question, to leave the aperture there, why, then, gentlemen of the jury, under those circumstances, the plaintiff would be entitled to recover. . . . It [the defendant] must use cars which are reasonably safe; and the question for your consideration on this branch of the case is, whether the defendant used reasonable caution in adopting the style of car that it did adopt."

If the plaintiff undertook to alight when the car was in

motion, the existence of this aperture, and the fact that he got his foot caught therein, would not aid his recovery. The proximate cause of the injury in that case would be his own negligence. If the car started before giving plaintiff time to alight, the company was liable for the consequences of that act, although the car was properly constructed, and the existence of the aperture actually necessary.

Negligence will not be presumed from the bare fact of the accident. There must have existed, before its occurrence, some suggestion of danger, in order to make defendant liable as for negligence. The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence. Nor can it be said that a mode of construction is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of passengers or company.

It was not claimed by plaintiff that his fall was occasioned by getting his foot into this aperture, but that the sudden movement of the car before he had opportunity to alight threw him, and forced his foot into the aperture, and wedged it in so that it caught, and he was dragged some distance. A passenger who voluntarily jumps on or off from a car while it is in motion does so at his own peril, and that construction cannot be said to be defective which is only unsafe in view of such conduct. On the other hand, street-car companies owe it to their patrons to allow them an opportunity to get on and off, and the starting of the car while either is being done is clearly negligent; but such act does not make defective a construction which under other circumstances is reasonably safe. In other words, conveyances are constructed with reference to their prudent and careful management and use.

The court erred in submitting to the jury, under the evidence in the case, the question of defendant's negligence in adopting the style of car in question, and in having the apertures therein.

Judgment is reversed, and a new trial granted, with costs of this court to defendant.

NEGLIGENCE — PRESUMPTION FROM ACCIDENT. — As to when negligence may be presumed from the happening of an accident, and when not, see *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and note 490-495.

STREET-CAR COMPANY, DUTY OF. — A street-car company must allow its passengers sufficient time to get off its cars: *Nichols v. Sixth Avenue R. R. Co.*,

38 N. Y. 131; 97 Am. Dec. 780, and note; *Finn v. Valley City etc. R'y Co.*, 86 Mich. 74; *Weber v. Kansas City C. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541.

PASSENGERS ON STREET-CARS, NEGLIGENCE OF.—It is negligence for a passenger on a street-car to leave or attempt to leave the car while it is in motion: *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y. 131; 97 Am. Dec. 780; *Weber v. Kansas City R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541. In *Schacherl v. St. Paul C. R'y Co.*, 42 Minn. 42, it was decided, that whether one is guilty of negligence *per se* in getting off a moving street-car is a question of fact for the determination of the jury. It is negligence to attempt to get on a street-car while in motion: *Reddington v. Philadelphia Tr. Co.*, 132 Pa. St. 154.

NEWLOVE v. CALLAGHAN.

[86 MICHIGAN, 297.]

HUSBAND AND WIFE — JOINT PURCHASE OF LAND BY — PRESUMPTION.—

Where land is purchased by and conveyed to husband and wife jointly, the husband will be presumed to have paid one half the purchase price, in the absence of any showing to the contrary.

HUSBAND AND WIFE — FRAUDULENT CONVEYANCE — ESTATE IN ENTIRETY.—

A husband and wife, by jointly purchasing real estate and having it conveyed to them jointly, cannot thus create an estate in entirety at the expense of the husband's creditor, and hold it in fraud of his rights.

Keena and Lightner, for the appellant.

Conely, Maybury, and Lucking, for the respondents.

McGRATH, J. This is a judgment creditors' bill filed by Alvin Wood and Herbert W. Newlove, copartners as Alvin Wood & Co., to obtain satisfaction of a judgment obtained January 23, 1886, against defendant John Callaghan, for \$543.17, upon a promissory note. The note was given December 1, 1884, and was protested January 3, 1885. The levy in aid of which the bill was filed was made upon a certain lot of land purchased jointly as husband and wife, October 13, 1885, for the sum of \$1,850, and deeded to them jointly at that time.

The testimony is voluminous, and consists mainly of the examination of defendant John Callaghan, by complainant, under objection made by his co-defendant, Elizabeth Callaghan. The complainant sought to examine the defendant Elizabeth Callaghan, but her husband objected, and she refused to be sworn and to testify. In the view I take of the case, it is unnecessary to consider the testimony of the defendant John Callaghan, and therefore unnecessary to discuss the question as to whether it was admissible or not.

It does appear that at the time of the purchase of this property, the defendant John Callaghan was indebted to complainant in the amount of this judgment, and that defendants jointly purchased this property, and jointly paid the sum of \$1,850 therefor, and that the deed was made to them jointly. In the absence of any showing to the contrary, the defendant John Callaghan must be presumed to have paid one half of the purchase price.

The answer sets forth that the object of taking the title in the joint names of defendants was "simply that the survivor should own the same, as they have no children." It appears from the testimony of John Callaghan, taken before objection was made thereto, that defendants owned jointly, exclusive of the lot in question, over twenty thousand dollars' worth of real estate, consisting of several parcels which had been purchased prior to the origin of the debt in question, and that defendant John Callaghan owned no separate property.

It would be a gross injustice to permit debtors to apply moneys which should be applied to the payment of their debts to the creation of an estate which would be beyond the reach of their creditors. Had the entire estate been placed in the wife's name, there could have been no question but that the same would be regarded as fraudulent under the statute; and it is no less a fraud upon creditors because the title has been taken in the name of the defendants jointly. In other words, estates in entirety cannot be created at the expense of creditors, and held in fraud of the latter's right.

The complainant is entitled to a decree for the sale of an undivided half of the premises in question, and the costs of both courts, and the same is ordered, and the case remanded for further proceedings in accordance herewith.

HUSBAND AND WIFE—JOINT CONVEYANCE TO. — A conveyance to husband and wife vests in them an estate by the entireties: *Emyeart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and exhaustive note; *Orthwein v. Thomas*, 127 Ill. 555; 11 Am. St. Rep. 159; *Stewart v. Babbs*, 120 Ind. 568. Equity will not interfere to subject to payment of a husband's debts, contracted before marriage, an estate purchased with the money of the wife, but held by them jointly: *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49. See also *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64, and note 65-68.

STEVENS v. HANNAN.

[86 MICHIGAN, 304.]

NEGOTIABLE INSTRUMENTS — ASSIGNMENT — RIGHT OF ACTION. — Where the effect of an assignment of a note is to render it non-negotiable, the assignee may bring suit thereon in his own name; and if such is not the effect, the indorsement thereof by the assignee, and delivery to a third person, entitles the latter, as holder, to sue in his own name.

NEGOTIABLE INSTRUMENTS — ASSIGNMENT — CONTRIBUTION. — A joint maker of a note who holds it by assignment or indorsement from the payee cannot, by indorsing or assigning it to a third person before maturity, convey any right except to sue for contribution, the appearance of his name as one of the makers being sufficient notice to his assignee or indorsee.

Bowen, Douglas, and Whiting, for the appellant.

H. E. Spalding and John D. Conely, for the respondent.

McGRATH, J. Defendants Hannan, Coolican, and Watson executed and delivered to defendant Batchelder, in part payment for some land, the following note: —

“\$1,300.

TOLEDO, OHIO, Nov. 1, 1887.

“On or before one year after date, we promise to pay to the order of William M. Batchelder thirteen hundred (1,800) dollars, at Toledo, Ohio, value received, with interest at the rate of six per cent per annum, payable semi-annually.

“WILLIAM W. HANNAN.

“JAMES S. COOLICAN.

“RALPH E. WATSON.”

On the 4th of November, 1887, Batchelder transferred the note to Watson, by written assignment of the note on the back thereof, as follows:—

“TOLEDO, OHIO, Nov. 4, 1887.

“For value received, I hereby assign all interest in and to this note to Ralph E. Watson. “W. M. BATCHELDER.”

Watson transferred it in turn to the plaintiff for value before maturity, by writing his name on the back, and delivering it to him.

The declaration was on the common counts, with a copy of the note and the writings on its back appended, with the usual notice. On the trial a count was added, averring an assignment of the note from Watson to plaintiff. Defendants had judgment, and plaintiff appeals.

The defendant Hannan, upon the trial, insisted, — 1. That the plaintiff could not sue in his own name, but should have brought suit in the name of the payee; 2. That the note,

being transferred to Watson, one of the makers, was paid, and therefore could not again be put in circulation so as to charge defendant Hannan in a suit upon it.

I do not think that the first point is well taken. If the effect of Batchelder's indorsement was to make the note thereafter non-negotiable, then the assignment from Watson to plaintiff entitled plaintiff to sue in his own name under the statute, and if Batchelder's indorsement did not affect its negotiability, then Watson's indorsement entitled plaintiff, as holder of the note, to sue in his own name.

The second point raised is well taken. Watson, while the note was in his possession under the assignment or indorsement to him, could not have brought suit, except for contribution, and he could not, by assignment or indorsement, convey any greater right than he himself had. His name appearing as one of the makers was sufficient notice to plaintiff.

The judgment below is affirmed, with costs.

NOTES, ACTIONS ON — WHO MAY SUE. — The proper person to sue as plaintiff in an action upon a note is the legal holder thereof: *Thompson v. Cartwright*, 1 Tex. 87; 46 Am. Dec. 95, and note; *Feltier v. Schroder*, 19 La. Ann. 17; 92 Am. Dec. 521, and note; *Bumell v. Cummings*, 61 Vt. 212. Any holder of a note, payable to the payee or bearer, may sue thereon, without setting up and proving an assignment: *Bitzer v. Wagar*, 83 Mich. 223. The indorsee of a note under an unconditional indorsement is the proper party to sue thereon: *Blmquist v. Markoe*, 45 Minn. 305. A purchaser of an attested note without indorsement may sue thereon in the payee's name, with or without the latter's consent: *Troeder v. Hyams*, 153 Mass. 537. In *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382, it is decided that the second transferee of a note cannot maintain an action against the payee except by virtue of the contract of indorsement.

ALLEN v. MOHN.

[86 MICHIGAN, 323.]

VENDOR AND VENDEE — BREACH OF CONTRACT TO PURCHASE — REMEDY. —

Under a contract for the purchase of land, providing that the vendor may declare the contract void and take possession on failure of the vendee to perform the conditions named therein, the vendor may, upon the abandonment of the contract and of the premises by the vendee, either maintain a bill for specific performance, or a suit at law for the purchase price, or for repossession of the premises and damages for the breach of the contract.

VENDOR AND VENDEE — BREACH OF CONTRACT TO PURCHASE — MEASURE OF DAMAGES in a suit by the vendor for breach of a contract to purchase

land is the difference between the contract price and the value of the land at the time of re-entry and abandonment of the contract by the vendee, less what has been paid. The vendor can only be deprived of this remedy by the terms of his contract, or by his acts and conduct, constituting a waiver.

P. A. Lyon, for the appellant.

W. H. Lockerby, for the respondent.

GRANT, J. Plaintiff and defendant made a contract, by which plaintiff agreed to sell to defendant certain real estate. The contract was made in November, 1886. In September, 1890, defendant informed plaintiff that he could not go on with the contract, refused to pay the interest which was then due, and said that he would give up the contract. While the testimony is not clear as to the circumstances under which plaintiff took possession of the land, it appears to be conceded by both parties that defendant abandoned the premises, and plaintiff thereupon took possession. The contract contained the following clause: "It is mutually agreed between the parties that the said party of the second part shall have possession of said premises on and after date hereof, and he shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid; and if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid on such contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom."

Upon the abandonment of the contract and of the premises by defendant, plaintiff had his choice of three remedies: 1. Bill for specific performance; 2. Suit at law to recover the purchase price; and 3. A repossession of the premises, and a suit to recover damages for a breach of the contract.

The latter remedy is supported by the following authorities: *Old Colony R. R. Co. v. Erans*, 6 Gray, 25; 66 Am. Dec. 894; *Griswold v. Sabin*, 51 N. H. 170; 12 Am. Rep. 76; *Meason v. Kaine*, 67 Pa. St. 126; 63 Pa. St. 335; *Porter v. Travis*, 40 Ind. 556; *Wasson v. Palmer*, 17 Neb. 330. In such case the measure of damages is the difference between the contract

price and the value of the land at the time of abandonment and re-entry, less what has been paid. This rule is just, and places vendor and vendee upon a footing of equality and mutuality. In order to deprive the vendor of this remedy, it must either be excluded by the terms of the contract, or waived by his acts and conduct. In this case the contract does not exclude it, nor has the plaintiff waived it.

The circuit court was in error in directing a verdict for the defendant.

Judgment is reversed, with costs, and a new trial ordered.

VENDOR AND VENDEE — BREACH OF CONTRACT TO PURCHASE — RIGHTS OF VENDOR. — In an executory contract for the sale of land, upon failure of the vendee to pay an installment of the purchase-money, the vendor can annul the contract and take possession of the property: *Moses v. Johnson*, 88 Ala. 517; 16 Am. St. Rep. 58. A vendor may invoke the power of a court of equity to decree the specific performance of a contract for the sale of lands: *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394, and note; *Estes v. Browning*, 11 Tex. 237; 60 Am. Dec. 238, and note.

VENDOR AND VENDEE — BREACH OF CONTRACT TO PURCHASE — MEASURE OF DAMAGES. — In an action at law by a vendor for breach of contract to purchase land, the damages recoverable is the difference between the contract price and the market value of the land at the time of the breach, less the amount already paid: *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394, and note; *Fears v. Merrill*, 9 Ark. 559; 50 Am. Dec. 226, and note; *Muenchow v. Roberts*, 77 Wis. 520; *Cade v. Brown*, 1 Wash. 405.

COSTELLO v. TEN EYCK.

[86 MICHIGAN, 348.]

AGISTMENT — LIABILITY FOR DEATH OF ANIMAL — SUNDAY CONTRACT. — One who takes a horse to pasture by the month for hire, knowing that other horses in the same pasture are infected with a contagious distemper, which fact he conceals from the owner, and in consequence of which the horse so taken contracts the distemper and dies, is liable to the owner for the value of the horse, in an action of trespass on the case, and the fact that the contract for the pasturage is void because made on Sunday constitutes no defense.

BAILMENT — VOID CONTRACT. — Where one, in the absence of any contract, becomes a bailee and liable for the safe return of the property by retaining the possession, the fact that he took possession under a void contract is no defense.

TORT — JOINT DEFENDANTS — RECOVERY AGAINST ONE. — In an action of tort against joint defendants, recovery may be had against the defendant alone who committed the wrong.

JUSTICES' COURTS. — **PLEADINGS** in justices' courts are to be liberally construed, and though informal, where they fairly apprise the defendant of the claim made against him, they are sufficient.

George H. Prentiss, for the appellant.

Brennan and Donnelly, for the respondent.

LONG, J. This action was commenced in justice's court against defendant and one William Ten Eyck, where plaintiff had judgment. The cause was removed to the circuit court for the county of Wayne, and there tried before a jury, which rendered a verdict against the defendant Charles Ten Eyck, for seventy-five dollars. The court directed the jury that no verdict could be taken against the other defendant. Judgment was subsequently rendered against the defendant Charles Ten Eyck in favor of the plaintiff, the other defendant having judgment for costs against the plaintiff. Defendant Charles Ten Eyck brings the case to this court by writ of error.

The declaration was filed in justice's court, and sets up that "John Costello, plaintiff, complains of William Ten Eyck and Charles Ten Eyck, the defendants herein, in a plea of trespass on the case, for that, whereas, the plaintiff, on, to wit, on or about the first day of October, 1888, at the township of Dearborn, in said county, delivered to the defendants a certain horse, being of a dark sorrel, of the plaintiff (at the time of delivery of said horse to defendants said horse was well and sound), to pasture, at the rate of three dollars per month, and the defendants well knew at the time of the plaintiff's delivery of the said horse for pasturing that there was disease among the horses in the pasture in which the plaintiff's horse was left by said defendants; that the said horse thereafter, about five weeks, by reason of such disease among the horses and pasturage, and by the defendants not supplying water for said horse, the said horse died, to the damage of the plaintiff one hundred dollars, and therefore he brings suit."

The plaintiff, on the trial, introduced evidence tending to show that defendant Charles Ten Eyck was in the business of taking in horses to pasture for hire, and that on September 30, 1888, plaintiff, by his brother, sent the mare in question to defendant to pasture, under an agreement to pay therefor three dollars per month. The mare remained there about three weeks, when plaintiff learned of the fact that the horses in defendant's pasture were afflicted with distemper. Testimony was also given, tending to show that during the months of August and September of that year the defend-

ant's pasture was infected with disease; that certain persons having horses therein took them out by reason of this disease; and that defendant had knowledge that these horses were taken out by reason of being diseased before the time plaintiff's horse was turned into pasture, and that he gave plaintiff no notice of that fact, but permitted his horse to remain there, with full knowledge of the diseased condition of the pasture and the horses therein. It also appears that this disease was highly infectious.

Defendant introduced testimony tending to show that he had no knowledge that any distemper existed there in the pasture, or among the horses there at pasture.

Several defenses were interposed on the trial of the cause in the court below, and several questions are presented to this court as reasons why the judgment and verdict of the court below should be reversed. It appears that the horse was put into the pasture, and the contract made for its keeping, on September 30, 1888, which was upon Sunday. It is contended by defendant that plaintiff could not recover in this action, because it was a Sunday contract for the keeping of the horse; and that, inasmuch as the contract is void, no recovery could be had. Counsel cites in support of this proposition many cases from this court and the courts of other states holding Sunday contracts void.

The statutes of this state (Howell's Stats., sec. 2015) provide that "no person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor to the solemnization of marriages."

The penalty for the violation of this statute is by fine. This statute has been passed upon many times by this court, and it has been held that contracts made upon Sunday are absolutely void, and that such contracts could not be ratified upon a week-day thereafter: *Adams v. Hamell*, 2 Doug. (Mich.) 73; 43 Am. Dec. 455; *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355; 40 Am. Rep. 476; *Brazee v. Bryant*, 50 Mich. 141; *Saginaw etc. R. R. Co. v. Chappell*, 56 Mich. 194.

Under this statute and these decisions, and the decisions

of courts in other states passing upon similar statutes, cited by defendant's counsel in his brief, it is contended that the court should have directed the jury to return a verdict in favor of the defendant, for the reasons, — 1. That the action is *assumpsit*; 2. That whether it is in *assumpsit* or is an action on the case, it cannot be sustained without the aid of the contract, and that contract being void, there is nothing left upon which to base the action.

The action, as before stated, was commenced in justice's court. The declaration was evidently drawn by the plaintiff without the aid of counsel, but it was evidently intended by the pleader to claim damages in the action for the wrong in permitting his horse to be turned into pasture, the defendant knowing of the existence of disease there. It is a plea in trespass on the case, and claims damages in the sum of one hundred dollars, and we think the declaration is one in trespass on the case, and not in *assumpsit*. Declarations in justices' courts are to be liberally construed, and though informal, where they fairly apprise the defendant of the claim made against him, may be held sufficient: *Fletcher v. Bradford*, 45 Mich. 349; *Wilcox v. Toledo etc. R. R. Co.*, 43 Mich. 584.

It does not necessarily follow that an action cannot be maintained because the contract for the pasture, being made on Sunday, was void. The defendant took the horse into his possession, and it continued in his possession for the three weeks following. At the time of its being turned into pasture, and during the subsequent time that it remained there, the defendant knew that it was subject to the disease then prevalent among the other horses in the pasture. Having taken the horse into his possession, though under a void contract, he yet owed a duty to the plaintiff to exercise some degree of care over it. He was bound to give the plaintiff notice of the disease, so that the plaintiff might have removed the property, or have taken some precaution himself, or to have refused to put the horse in the pasture there.

Generally, no person can be compelled to become a depository without his own consent; but there are cases where a person may be subject to the duties and liabilities of a depository without any intention on his part to enter into any contract, or to assume any liability in regard to the property in question. The finder of property of a person unknown is not bound to interfere with it. He may pass by, if he please, and

has then no responsibility in relation to it; but if he takes it into his possession, he becomes at once bound, without any actual contract, and perhaps without any actual intention to bind himself, to the owner of the property, for its safe-keeping and return: *Smith v. Nashua etc. R. R. Co.*, 27 N. H. 86; 59 Am. Dec. 364.

In *Brazee v. Bryant*, 50 Mich. 136, plaintiff sued to recover for money paid by him to defendant for a horse, on the claim that the horse was not what the defendant had recommended it to be. On the trial, the parties were permitted to go into evidence respecting the warranty of the soundness of the horse, and whether the warranty was broken. The contract of purchase appears to have been made on Sunday. The plaintiff was permitted to recover in that case because of the Sunday contract. The defendant attempted to recoup damages, and the court instructed the jury that, there being no contract in the case, there was nothing to rescind, and nothing to constitute a basis for recoupment. It was said by Mr. Justice Cooley in that case: "If plaintiff, while the horse was in his hands, misused it, or failed to observe any duty implied from his assuming the position of bailee, the defendant will be entitled to his proper remedy. But no right of action for such misconduct or neglect could be made use of as a defense to an action for money had and received."

It is claimed that the court was in error in directing the verdict in favor of the plaintiff against one of the defendants alone; that if any recovery could be had in the case, it should have been a joint judgment against the two; but, as we have said, the action is not in *assumpsit*, but in tort, for wrongfully taking the horse to pasture, and permitting it to remain there, knowing that the pasture and the other horses therein were diseased, and giving no notice to the plaintiff of that fact. It being a tort, the court very properly held that a recovery could be had against the person committing the wrong, and was not in error in directing that no recovery could be had against William Ten Eyck.

It is further contended by defendant's counsel that there was no competent evidence that the horse died by disease, and that, even if she did die of this distemper, there was no competent evidence tending to show that she contracted it in defendant's pasture. There was some competent evidence tending to show these facts, and it is not for this court to say

what weight shall be given to the evidence. That is a question solely in the province of the jury.

Error is also assigned upon the following portion of the charge of the court to the jury: "It is unquestionably the duty of Mr. Ten Eyck to know as to the condition of the horses that he had in pasture. No doubt he did know. He testified that he examined into their condition, and that, knowing the condition of the horses. If you find in this case from the testimony that horses in the pasture with the defendant Charles Ten Eyck were afflicted with the distemper, immediately before or at the time the plaintiff's horse was brought there and was received by the defendant, and that the disease was likely to be or might be communicated to the plaintiff's horse, and if you find that the disease was there at the time that the plaintiff's horse was taken to Charles Ten Eyck's, and that the defendant Charles Ten Eyck knew, or ought to have known, that the disease was prevalent in his pasture, then it was his duty to have informed the plaintiff's agent of that fact; and if the plaintiff's horse took the distemper at the defendant's place, from contact with diseased horses or by infection, and in consequence thereof died, plaintiff is entitled to recover what, under the judgment of the jury, under the evidence in the case, the horse was fairly worth."

We find no error in this ruling. Under the circumstances of the case, the law was properly stated by the court, and we think, under the testimony of the defendant, that he did know that there was disease among the horses in his pasture at the time the plaintiff's horse was turned in there. He testified that there was a common disease among the colts in the pasture there, called a "distemper," all along during the summer before, and that he took from the pasture one of the horses, put it into the barn, and cared for it until it got well.

There is some question, also, as to whether the court properly instructed the jury that they might find that William Ten Eyck acted as agent of Charles Ten Eyck in relation to this pasture. There was some evidence in the case tending to show this fact, and the court was not in error in leaving the question to be determined by the jury.

There is also error assigned upon the ruling of the court in admitting testimony as to the value of the horse. We find no error in these rulings, and shall not discuss the other questions raised.

The judgment of the court below must be affirmed with costs.

ANIMALS — LIABILITY OF AGISTER FOR THE SPREAD OF INFECTIOUS DISEASE. — Plaintiff, having agreed to pasture defendant's sheep, turned them into a field separated by an insufficient fence from the field of S., part of which it was the duty of the plaintiff to keep in repair. The sheep having escaped into S.'s field, and become diseased from contact with other sheep, the court decided, in an action to account for agistment, that plaintiff was guilty of negligence in suffering the sheep to escape, and that defendant might recoup damages: *Sargent v. Slack*, 47 Vt. 674; 19 Am. Rep. 136, and note. Compare *Eaton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377.

SUNDAY — ILLEGAL CONTRACT. — It is no bar to an action on an account stated that the defendant's indebtedness was for liquors sold by plaintiff on Sunday, contrary to law, if the account was not stated on Sunday: *Melchoir McCarty*, 31 Wis. 252; 11 Am. Rep. 605. Where the owner of a horse let it on Sunday to be driven for pleasure to a particular place, and the hirer drove it to a different place, and injured it, the owner can maintain an action of tort for conversion of the horse, notwithstanding the contract of hiring was illegal and void: *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30. Compare *Parker v. Latner*, 60 Me. 528; 11 Am. Rep. 210, and note.

CEEDER v. LOUD AND SONS LUMBER COMPANY.

[83 MICHIGAN, 541.]

CORPORATIONS — AUTHORITY OF PRESIDENT AS AGENT IN EMPLOYING MEN.

— The president of a lumber manufacturing corporation, in the active management of its business, and in the absence of proof of any limitation to employ men, or that authority in reference thereto had been conferred upon any other person, has authority to employ men by the season in the business of the corporation.

CORPORATIONS — AUTHORITY OF PRESIDENT AS AGENT. — The president of a manufacturing corporation, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control and management, and to have authority to do what is usually and ordinarily done by such agents or managers.

CORPORATIONS — POWER OF AGENT. — The primary intention of a corporation in employing an agent is, that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with such agent upon that understanding.

CORPORATIONS — AUTHORITY OF PRESIDENT AS AGENT. — The fact that a person having the active conduct of the business of a corporation is also its president does not operate as a limitation upon the powers usually exercised by its general agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incident to the management of the business.

Hanchett, Stark, and Hanchett, for the appellant.

C. E. Pierce, for the respondent.

McGRATH, J. Ceeder sues for wages, claiming a hiring for the season of 1889 at \$3.50 per day, and setting up a discharge without cause before the expiration of his time.

One Aiken says that, in the spring of 1889, H. M. Loud, who was the president of the company, instructed him to go to Bay City, and employ two sawyers for the season, at \$3.25 per day each; that he went to Bay City, but was unable to get his men at less than \$3.50 per day, and sent word to Loud by one Chase, and wired Peterson, who was the superintendent of the mill, to meet Chase; that he received the reply telegram the same evening, and employed plaintiff and another for that season at \$3.50 per day. He was not allowed to give the contents of the telegram, but after stating the employment, he was asked: "Did you have any instructions from Mr. Loud to make such an arrangement?" and replied: "Yes, I did."

Ceeder testifies to his employment by Aiken for defendant at \$3.50 per day for the season; that "he [Aiken] came there with the telegram from H. M. Loud and Sons Lumber Company. He read it over at the house. . . . That was Tuesday. . . . I left Bay City on the 7th of May, and arrived at Oscoda that night, about 6 o'clock. Upon my arrival I saw Mr. Loud, and gave him a letter that Mr. Aiken had given me. He says, 'All right; you are the two sawyers.' Says I, 'Yes.' . . . Then Mr. Loud said, 'Look around town, and I will see Mr. Peterson to-morrow, and give you work.'"

That he went to work on the 10th of May, and worked until July 6th, when he was discharged without cause; that in June plaintiff and Paul Lemme, who was hired with plaintiff, were in the office of the company, and Loud was present, but witness was not sure that Loud heard the conversation; that Lemme asked Peterson if he was going to pay \$3.50 per day for the season, and Peterson said: "Yes; that is the understanding"; that plaintiff could not get work till the 29th of July, when he obtained employment at \$2 per day for the balance of the season.

He was paid at the rate of \$3.50 per day up to and including the fifth day of July, and it is admitted that, if entitled to a verdict at all, he was entitled to \$222.50, the amount found to be due by the jury.

The defendant raised two questions of fact upon the trial: 1. That Aiken was not instructed to employ plaintiff for the season; 2. That plaintiff was discharged for cause. Both of

these questions have been settled by the verdict. The only question raised here is, that defendant is a corporation; that this is not a case of the ordinary employment of labor for the necessities of the company, but a special contract for the entire season, and it was not shown that the president had any authority to make such a contract. No testimony was offered tending to show that any limitation upon the president's powers with respect to the employment of men, nor was there any testimony offered to show that any authority had been conferred upon any particular person with reference to the same subject. It appears that Loud was in open and notorious charge of the business, and was there in the office from day to day, directing its conduct. The business of the corporation was the manufacture of lumber.

A president of a manufacturing company, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control or management, and to have authority to do what is usually and ordinarily done by such agents or managers. The primary intention of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent upon that understanding.

In *Adams Mining Co. v. Senter*, 26 Mich. 73, 76, referring to the powers of a mining agent, this court say: "We are not satisfied that any testimony would be needed to show the extent of the ordinary powers of an agent in charge of such a mine. The authority of such officers must, within the usual range of business at least, be recognized judicially, like that of bank cashiers, vessel captains, and other known agents. The mining law recognizes agents by name, as known representatives on whom process may be served. They are the persons who have charge, personally, of the local business at the mines, and are necessarily to be treated in law as general agents, to do all that is fairly within the scope of corporate business in conducting the operations in that locality. . . . The business could not be conducted at all without a very wide discretionary power. There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business. A general agent needs no instructions within the range of his duties, and any limitations on his

usual powers would not bind others dealing with him, and not warned of the restrictions."

The fact that a person having the general direction and active conduct of the business of a corporation is also its president does not operate as a limitation of the powers usually exercised by such agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incident to the management of the business. The case is clearly within the principle laid down in *Adams Mining Co. v. Senter*, cited above. See also *Eureka Iron Works v. Bresnahan*, 60 Mich. 332; *Whitaker v. Kilroy*, 70 Mich. 685.

The judgment is affirmed, with costs to plaintiff.

CORPORATIONS — POWERS OF THE PRESIDENT OR MANAGING AGENT. — The president of a corporation may, without express authority, do any acts necessary to carry on the business of the corporation: *Sherman etc. Co. v. Swigart*, 43 Kan. 292; 19 Am. St. Rep. 137; *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621, and note; *Washburn v. Nashville etc. R. R. Co.*, 2 Head, 638; 75 Am. Dec. 784; *Chicago, Burlington etc. R. R. Co. v. Coleman*, 18 Ill. 297; 68 Am. Dec. 544, and note. The acts of the president of a corporation done in the management of the business, and within the scope of his authority, are the acts of the corporation: *Marlatt v. Levee etc. Co.*, 10 La. 583; 29 Am. Dec. 468; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; *Lancaster County v. Charas etc. R. R. Co.*, 28 S. C. 135; *Stebbs v. Joshua Hendy M. W.*, 86 Cal. 200.

BROOKS v. MANGAN.

[86 MICHIGAN, 576.]

ORDINANCE — REASONABLENESS — RESTRAINT OF TRADE — DISCRIMINATION. — A municipal ordinance requiring a hawker or peddler who travels on foot to pay a license of ten dollars for the first day and five dollars for each subsequent day, and if traveling with one horse, twenty dollars and fifteen dollars, and if traveling with two or more horses, twenty-five dollars and fifteen dollars, for the first and all subsequent days, is invalid, as unreasonable and in restraint of trade, and as discriminating between residents and non-residents of the city.

JUSTICE OF PEACE — LIABILITY FOR JUDICIAL ERROR. — A justice of the peace, acting in good faith and having jurisdiction of the person and of the subject-matter, is not civilly liable in damages for error of judgment in holding an unconstitutional ordinance valid and enforcing it by imprisoning the violator of it. Nor is the officer liable who makes the arrest in such case.

INFERIOR COURTS — LIABILITY FOR JUDICIAL ERRORS. — Inferior tribunals have a right to exercise their honest judgment in passing upon all questions presented to them; and when they have so exercised it, they are exempt from civil liability for errors, although such errors result in depriving the citizen temporarily of his liberty. His only remedy is by appeal.

T. A. E. and J. C. Weadock, for the appellants.

Gallagher and Barry, for the respondent.

GRANT, J. Plaintiff obtained a verdict and judgment against defendants for false imprisonment for \$450.

Defendant Mangan was the police justice of Bay City, and defendant Catlin was a policeman. One Michael Tanney entered a complaint against the plaintiff, charging him with a violation of a city ordinance in regard to hawking and peddling. A warrant was issued by the justice, and placed in the hands of Catlin, who executed it by arresting plaintiff and bringing him before the justice for trial. The trial was adjourned three days, and plaintiff permitted to go on his own recognizance. He waived a trial by jury, was convicted, sentenced to pay a fine of one hundred dollars, and in default thereof, that he be confined in the county jail until the payment thereof, not exceeding ninety days. He refused to pay the fine, and was committed to jail, where he remained four days, after which he was released on an appeal bond, having appealed his case to the circuit court. Plaintiff employed an attorney upon the trial of the cause before the justice, who there claimed that the ordinance was unconstitutional and void.

The justice had jurisdiction of the person and of the subject-matter of the suit. It is not claimed that the defendants acted in bad faith. On the contrary, it is manifest that both acted honestly, and in the belief that they were in the performance of their official duties. The violation of the ordinance by plaintiff is conceded. The sole question raised before the justice was upon the validity of the ordinance. The defendant Mangan, in the exercise of his honest judgment, held it valid, and the defendant Catlin acted upon a warrant and commitment fair upon their face.

The ordinance required every person soliciting a license as a hawker or peddler to pay ten dollars for the first day, and five dollars for each subsequent day, if he traveled on foot; if he traveled with one horse, twenty dollars for the first day, and fifteen dollars for each subsequent day; if he traveled with two or more horses, twenty-five dollars for the first day, and fifteen dollars for each subsequent day. We think the ordinance invalid, on account of its unreasonableness. Practically, if enforced, it would amount to a prohibition of the business. The ordinance is objectionable upon another

ground, viz., it makes an unjust discrimination between residents of Bay City and non-residents. It practically exempts residents from its provisions, while imposing so unjust and unreasonable a license upon non-residents. Counsel for the defendants did not seriously contend for its validity.

The main question is, Are these defendants to be held responsible in a civil action, — the one for his judicial determination, and the other for executing a warrant issued by a court of competent jurisdiction? Plaintiff's counsel state their position as follows: "Officers acting under unconstitutional laws are liable, no matter how innocently they may act, nor how ignorant they may be of the invalidity of their process. It is a fundamental rule in the law of torts, that no matter how good the faith of the wrong-doer, nor how earnestly he may believe that his acts are justified, he must respond in damages to the party on whom he has inflicted the wrong."

This statement, under all the authorities, must be confined to inferior judicial officers. It is conceded that circuit judges cannot be held liable in a civil action for any judicial determination, although such determination results in depriving the citizen temporarily of his liberty. Circuit judges are usually men of experience and education in the law, while justices of the peace seldom have any legal education or training. Upon what reason should the former be held exempt from liability for their errors, while the latter must be severely punished for honest errors of judgment? I can find no reason in such distinction.

In the case of *Ortman v. Greenman*, 4 Mich. 291, this court severely censured a justice of the peace for holding an act of the legislature unconstitutional. In that decision the court said: "We regret that any magistrate should, in the course of his official duty, presume to do that which the highest judicial tribunals of the land do with great caution, and only after the most mature deliberation."

It is evident that, under this rule, justices of the peace would seldom hold an ordinance or act of the legislature valid were its unconstitutionality challenged in the interest of a respondent charged with crime. If these inferior officers are to be held liable in one case, it follows that they must in all; and a justice of the peace could therefore be held liable for binding a person over to the circuit court for trial, if it should afterwards be held by the appellate court that the act under

which he was arrested was unconstitutional. Public policy, in my judgment, forbids the adoption of such a rule.

In all criminal prosecutions there are two parties interested, viz., the accused and the people. It is inevitable, under any criminal procedure, that innocent persons will sometimes be arrested and tried. Judicial officers are, and must of necessity be, intrusted with the investigation and trial of offenses against the laws of the state, and in such cases constitutional questions must frequently arise for determination. When these officers have acted in good faith in determining such questions, the innocent is without remedy. The constitution guarantees no man immunity from arrest. It guarantees him a fair and impartial trial. It has provided him with appellate courts, to which he may resort for the correction of errors committed by the inferior courts. With this he must be content. These inferior tribunals should be left to the exercise of their honest judgment, and when they have so exercised it, they are exempt from civil liability for errors. This is the only rule which can secure a proper administration of our criminal laws. The interests of the individual must in such case yield to the interests of the public. This is the rule adopted by the supreme court of Iowa: *Henke v. McCord*, 55 Iowa, 378.

Judgment reversed, and new trial ordered.

MUNICIPAL CORPORATIONS — VALIDITY OF ORDINANCES — REASONABLENESS — DISCRIMINATION — RESTRAINT OF TRADE. — An ordinance in restraint of trade is void: *Hughes v. Recorder's Court*, 75 Mich. 574; 13 Am. St. Rep. 475, and note; *Chaddock v. Day*, 75 Mich. 527, 13 Am. St. Rep. 468, and note; *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 577. Ordinances passed by the governing body of a city must be reasonable; they must not be partial or unfair, nor make special or unwarranted discriminations: *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; *Hyde Park v. Carton*, 132 Ill. 100; *State v. Rowe*, 72 Md. 548. An ordinance which, by its effect, grants privileges to a certain class is void: *City of Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553; *State v. Schlemmer*, 42 La. Ann. 1166. As to the validity of ordinances in general, see extended note to *Milne v. Davidson*, 16 Am. Rep. 191-198.

JUSTICE OF PEACE — LIABILITY FOR JUDICIAL ERROR. — No action lies for a judicial act: *Tompkins v. Sands*, 8 Wend. 402; 24 Am. Dec. 46, and note; *Jones v. Hughes*, 5 Serg. & R. 298; 9 Am. Dec. 264; *Gregory v. Brown*, 4 Bibb, 28; 7 Am. Dec. 731, and note.

PEOPLE v. WAGNER.

[88 MICHIGAN, 504.]

MUNICIPAL CORPORATIONS — ORDINANCE REGULATING WEIGHT OF BREAD LOAVES. — An ordinance providing that all bread of every description manufactured by the bakers of the city shall be made into loaves of one, two, and four pounds, and no other, avoirdupois weight, and that no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight, but not attempting to fix the price of bread, is valid, and within the provisions of a charter empowering the common council to "direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof."

MUNICIPAL CORPORATIONS — ORDINANCE. — Constitutional provisions relating to the title of laws passed by the legislature do not apply to city ordinances.

POLICE POWER — PREVENTION OF FRAUD. — The state may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious.

POLICE POWER — EXTENT OF. — The police power of the state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection.

William Look and H. F. Chipman, for the appellants.

Charles W. Casgrain and Charles S. McDonald, for the people.

McGRATH, J. These cases come from the recorder's court of the city of Detroit by writ of *certiorari*, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record.

Defendants are bakers, and are charged with making for sale, selling, and offering for sale bread that was deficient in weight under the ordinance.

The ordinance is entitled "An ordinance relative to the manufacture and sale of bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows: —

"Sec. 4. All bread of every description manufactured by the bakers of this city for sale shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds, and no other, avoirdupois weight;

and no baker shall make for sale, or shall sell or expose for sale, any bread that shall be deficient in weight according to the requisitions prescribed in the preceding section of this chapter; provided always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing or causing to be weighed in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale; and provided further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread.

“Sec. 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked, stored, or deposited or offered for sale, and to inspect and examine all bread found therein, and also to stop, detain, and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weigh the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and if the said inspector shall find any bread not conformable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law.

“Sec. 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this ordinance, either by refusing him or delaying his entrance or admission into any of the places above mentioned, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it, shall be impeded or obstructed.

“Sec. 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed fifty dollars and the costs of prosecution, and the offender may be imprisoned in the Detroit house of correction until the pay-

ment thereof; provided always, that the term of such imprisonment shall not exceed the period of six months."

The defendants insist,— 1. That matters contained within the body of the ordinance are not within its title; 2. That by the ordinance private property is taken without compensation; 3. That the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; 4. That it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; 5. That the ordinance is not within the police powers of the state.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the legislature do not apply to ordinances enacted by a common council of a city: *People v. Hanrahan*, 75 Mich. 611, 615.

The ordinance does not provide for the taking, seizing, or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection might be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle, or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk.

In *Wheeler v. Russell*, 17 Mass. 258, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Eaton v. Kegan*, 114 Mass. 433, it was held that, in view of the statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and when asked what it is that evaporates, they reply, "Water." But they say the process of baking is not always uniform; that the oven may be too hot, in which case the bread crusts or skins quickly, retaining the moisture, and again, it may be too cold, in which case the bread dries up, rather than bakes, and in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly; that fermentation is not always regular, and when it reaches a

certain point the dough must be put into the oven, without reference to the condition of the oven; that the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust.

Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was fifteen years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance, and after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance.

Again, it is claimed that a barrel of flour will make 250 loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade.

The state may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious: Tiedeman's Limitation of Police Power, sec. 89, p. 208.

Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf. Each transaction involves but a few pennies, although the number of individual trans-

actions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two, or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf.

Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one third of a bushel, and they fix the size of a "barrel" of fruit, roots, or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection: *Tiedeman's Limitation of Police Power*, sec. 89, p. 208.

The charter of the city of Detroit empowers the common council to "direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293, 16 Am. St. Rep. 578, be subjected to the test of reasonableness.

The convictions are affirmed, and the writ dismissed.

MUNICIPAL CORPORATIONS — ORDINANCE. — Laws regulating the form of proceeding, and the constitutional provisions relating to the public statutes of the state, do not apply to municipal ordinances: *State v. Bonell*, 42 La. Ann. 1110; 21 Am. St. Rep. 413, and note.

MUNICIPAL CORPORATIONS — ORDINANCES — POLICE POWER. — The police power of the state is the authority vested in the legislature by the constitution to enact all wholesome and reasonable laws that they may deem conducive to the public good: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696, and note. An ordinance adopted by a municipal corporation under authority delegated to it by the legislature has the same force and effect within

the corporate limits as a statute passed by the legislature itself: *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490, and note. Laws preventing the imposition of fraud in the sale of articles are valid exercises of the police power of the state: *State v. Campbell*, 64 N. H. 402; 10 Am. St. Rep. 419, and note. It is clearly within the legislative power of the state to authorize city councils to pass ordinances regulating the sale of commodities: *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328, and note. A statute prohibiting the sale of spurious articles, thereby preventing fraud, is constitutional: *Steiner v. Ray*, 84 Ala. 93; 5 Am. St. Rep. 332, and note.

HUNTINGTON v. PARKHURST.

[87 MICHIGAN, 38.]

LANDLORD AND TENANT.—ONE WHO ENTERS INTO POSSESSION OF LAND UNDER AN AGREEMENT FOR A LEASE, which is to be reduced to writing according to the terms agreed upon, and who thereafter pays rent for two months and then refuses to execute such lease, nevertheless becomes a tenant either at will or from year to year, and both he and the landlord acquire rights of which neither can be divested without proper notice.

LEASE VOID BY THE STATUTE OF FRAUDS MAY BE REFERRED TO AS SHOWING THE INTENTION OF THE PARTIES, and it has been generally held that if the tenant enters and occupies the property, the agreement may be looked to as showing the terms under which the tenancy subsisted in all respects, except as to the duration of the term.

TENANCY AT WILL CANNOT BE TERMINATED WITHOUT THE NOTICE prescribed by the statute.

TENANT AT WILL WHO ABANDONS THE LEASED PREMISES without justifiable cause, and without giving the notice required by statute, remains liable for their use and occupation.

LANDLORD AND TENANT.—TENANT ENTERING UNDER A VOID LEASE may be compelled to pay rent for a longer period than he actually occupies, if by paying rent he has become a tenant at will, and he abandons the premises without giving proper notice to his landlord.

Q. A. Smith and A. D. Prosser, for the appellant.

A. B. Haynes, and Montgomery and Lee, for the plaintiff.

CHAMPLIN, C. J. This action was commenced before a justice of the peace to recover for the use and occupation of certain premises before then claimed to have been leased by the plaintiff to the defendant. The plaintiff had judgment before the justice, and the case was appealed to the circuit court, and there, after hearing the testimony, the court directed a verdict for the plaintiff.

We quote, with a few amendments, the statement of facts taken from the supplemental brief of counsel for defendant, namely: The plaintiff was the owner of a store building, in which was contained a stock of goods which had been attached,

and which was sold by the sheriff at public auction, and purchased by the defendant. When the goods were offered for sale, the plaintiff informed the auctioneer, and he so announced, that any purchaser of the stock of goods might obtain a lease of the store. Immediately after the purchase by the defendant, the plaintiff and he talked together with reference to leasing the store, and it was then agreed between them that the plaintiff would execute to defendant a written lease of the premises for a term of one year, with the privilege of three or five years, for a yearly rental of \$500, payable monthly, in installments of \$41.66. The defendant agreed to accept and enter into such a lease on those conditions, and on account of the lateness of the hour the plaintiff said he would have the lease drawn after he returned home, and they could execute it at some future time. Without any other agreement or understanding, defendant occupied the store two months, and paid the monthly rental of \$41.66. The defendant, through his father, during this period of time, requested the plaintiff to execute the lease, who replied that he would do so, but that, the defendant not being present to execute the lease with him, he would have it drawn so that when they came together it could be signed. The term commenced on the sixth day of May, 1890, and the rent was paid to July 6, 1890. On the third day of July the defendant removed from the premises. On the Sunday before, he had an interview with the plaintiff, in which he told him that he was going to vacate, to which the plaintiff replied that he had rented the store for a year. The defendant, after he had removed from the premises, locked the door, and left the key in a bank with which plaintiff was connected, with directions to deliver it to plaintiff. Plaintiff refused to accept the key or the possession of the premises, and after the next month's rent became due and payable, brought his action to recover for the use and occupation of the premises.

The first question to be decided is, What was the nature and extent of defendant's holding, under the facts above stated? The question so ably argued by defendant's attorney in his original and supplemental briefs, and orally before the court, namely, that the testimony shows that no actual lease was entered into, but that there was an agreement for a lease for a term of one year, with the privilege of three or five years, at an annual rental of \$500, payable monthly, at the rate of \$41.66, does not reach and dispose of the merits of the contro-

versy. The terms of the lease were agreed upon, and it was agreed that they should be reduced to writing. This, doubtless, was an agreement for a lease to be executed according to the terms agreed upon; but the testimony shows further that the defendant went immediately into possession under the agreement that he should have a written lease for one year, with the privilege of three or five years, as above stated, and occupied the premises and paid the stipulated rent for two months. Under such facts, the relation of landlord and tenant was created. The defendant became a tenant at will.

It is laid down by Taylor, in his work on landlord and tenant (sec. 60), that "where a party enters into the possession of premises under an agreement to accept a lease for twenty months, and subsequently refuses to accept the lease, he becomes by such refusal a strict tenant at will, for he may be ejected immediately; but if the landlord accepts rent from him monthly, or according to the terms of the original agreement, a general tenancy at will is created, commencing from the time of entry"; and "while a man who enters under a void lease is strictly a tenant at will, if he pays rent he becomes a general tenant at will or from year to year, according to circumstances."

In this case the agreement for a periodical rent, and the agreed term of a year, at all events, makes the holding of defendant a tenancy from year to year: See Taylor on Landlord and Tenant, sec. 56, and cases cited in note 2.

Counsel for defendant claim that an entry under an agreement for a lease is a mere license, and can be terminated by either party before the written lease is executed, and cited Taylor on Landlord and Tenant, sec. 87. The author does make use of the expression that "such an agreement, however, will operate as a license to enter upon the premises agreed to be demised"; but it was not the intention, as I think, of the author to convey the idea that a person so agreeing for a lease might enter and occupy the premises, and pay rent in accordance with the agreement, without becoming a tenant. The distinction is this: if he enters awaiting the execution of the agreement, his entry is one under a license, but if, after being in possession of the premises, he pays rent for the use of them in accordance with the agreement which was to be reduced to writing, his relation is that of a tenant at will; and the distinction is plainly pointed out at the close of the section cited, where the author says: "Any person, how-

ever, who may be in possession of land in pursuance of an agreement to let may, by the payment of rent or other circumstances, become a tenant from year to year."

Indeed, it would seem not to require any citation of authorities to prove that when a party, under an agreement for a lease, enters into possession and pays rent for the use of the premises, the relation between the parties cannot be other than that of landlord and tenant; it certainly is not that of licensor and licensee. The tenant has acquired rights of which he cannot be divested without the proper notice, and so has the landlord.

The same result follows where a lease is made by parol for a longer term than one year, which it is agreed shall be reduced to writing, and the party enters into possession under it, and pays rent, as where a lease is made for a longer term than one year by parol, and is void under the statute of frauds, and the tenant enters and occupies, paying rent, and is ruled by the same principles which apply to the latter class. In such cases it has been uniformly held that an implied tenancy from year to year will arise in cases where occupation is had under a parol demise for more than a year, void because exceeding the period allowed by the statute of frauds: *Taylor on Landlord and Tenant*, sec. 56.

Some cases hold that such a lease, although void for the period beyond a year, is good for one year, because it will be presumed that the parties intended to effect the lease for the term for which one could legally be made; but I think the better reasoning is, that a contract which is void by the terms of the statute of frauds is not good for any purpose further than to indicate what the intentions of the parties were with reference to the terms of the letting. The rights of the parties must be judged by the relation they have assumed with each other, independently of the void contract. Courts, however, have referred to the contract as throwing light upon the intentions of the parties, and it has been generally held that where a tenant enters and occupies under a parol lease for more than a year, the agreement may be looked to as showing the terms under which the tenancy subsists, in all respects except as to the duration of the term: *Doe v. Bell*, 5 Term Rep. 471; 1 Cruise's Digest, 281-284; *People v. Rickert*, 8 Cow. 226; *Schuyler v. Leggett*, 2 Cow. 660; *Gretton v. Smith*, 33 N. Y. 245; *Clayton v. Blakey*, 8 Term Rep. 3; *Laughran v. Smith*, 75 N. Y. 205.

In the case last cited, which was an action to recover rent, Andrews, J., said: "But although a parol lease for more than a year is void, yet it has long been settled that, when the tenant enters and occupies, the agreement regulates the terms on which the tenancy subsists, in all respects except as to the duration of the term. It is a reasonable inference in such case, from the circumstances, that the parties intended a tenancy on the terms of the original agreement, and the law implies a new contract between the parties corresponding therewith, so far as it is not in conflict with the statute."

In *Koplitz v. Gustavus*, 48 Wis. 48, the tenant had gone into the occupation of the premises under a lease which was void under the statute of frauds. It was contended by counsel for the lessee that "as the lease was not in writing, and was for a longer period than a year, it was void; that the rent reserved was not annual, but monthly, payable at the end of each month, on the plaintiff's demand; and that under these circumstances the tenancy created by holding over was one from month to month, and determinable by thirty days' notice."

The court, in deciding the case, after stating the position of counsel, said: "But to this it may be answered that there are well-considered cases which decide, under the English statute, and statutes which contain similar provisions, that while a parol lease for more than the prescribed period creates, in the first instance, only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year, by payment of rent or other circumstances which indicate an intention to create such yearly tenancy."

In *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124, the distinction between a license and a tenancy is clearly pointed out, and it was expressly held that a parol lease for more than a year, reserving an annual rent, under which the lessee had been put into possession, although invalid under the statute of frauds, was good as a lease from year to year, until terminated by notice. The principle in this case was cited with approval and applied in *Coan v. Mole*, 39 Mich. 454.

Schneider v. Lord, 62 Mich. 141, was a case where there was an unwritten lease for two years from the beginning of the year 1884. The rent was paid monthly for more than a year, and the lessee claimed the right to terminate the lease on a month's notice. The case below was decided on the

ground that the tenancy was at will from month to month, and ended by a month's notice to quit. It was, however, held that it was a tenancy from year to year, and not a monthly tenancy at will, and the fact that the rent was payable monthly did not any the less make it a contemplated yearly holding.

In the case at bar the contemplation of the parties was, that the holding should be, at all events, for one year, and with an additional term, depending upon the election of the lessee, and as to this he was a tenant at will from year to year, and not from month to month.

If, however, it should be conceded that the tenancy was at will from month to month, still the judgment below was correct. The principles of justice and sound policy require that estates at will should not be terminated except at the will of either party, and then not without notice. This principle was long since embodied in our statutes, which, with some recent modifications in respect to notice (Act No. 162, Laws 1885), read as follows:—

“All estates at will or by sufferance may be determined by either party by three months' notice given to the other party; and when the rent reserved in a lease is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the times of payment; and such notice shall not be held void by reason of its mentioning a day for the termination of the tenancy not corresponding to the conclusion or commencement of any such period, but in any such case, the notice shall be held to terminate the tenancy at the end of a period equal in time to that in which the rent is made payable. And in all cases of neglect or refusal to pay rent on a lease at will or otherwise, seven days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease. And in all cases of tenancy from year to year, a notice to quit, given at any time, shall be sufficient to terminate said lease at the expiration of one year from the time of the service of such notice”: Howell's Stats., sec. 5774.

The entry of defendant into possession under the terms of the agreement for a lease before it was executed, and paying rent in accordance with the agreement, created the relation of general tenancy at will, which could not be terminated by either party without notice to the other; and the tenant cannot, without justifiable cause, abandon the premises, and

treat it as a surrender, without giving the notice required by the statute: *Walker v. Furbush*, 11 Cush. 366; 59 Am. Dec. 148; *Whitney v. Gordon*, 1 Cush. 266; *Thomas v. Nelson*, 69 N. Y. 118; *Batchelder v. Batchelder*, 2 Allen, 105; *Schuyler v. Smith*, 51 N. Y. 309; 10 Am. Rep. 609; *Koplitz v. Gustavus*, 48 Wis. 48.

The record does not show that defendant had any justifiable cause for abandoning the premises. They were not, in fact or law, surrendered. Vacating the premises before the expiration of the term, and offering the key, which is refused, is not a surrender. The testimony shows that defendant paid rent to July 6th, vacated the premises July 3d, and on the Sunday previous, namely, June 29th, told the plaintiff he should move out, and plaintiff insisted that the store was rented for a year. Aside from the question whether notice given on Sunday would be valid, it plainly appears that it was entirely insufficient to terminate the tenancy, even if the holding was from month to month; and it follows as a natural consequence that until the tenancy is terminated, the defendant is liable for the use and occupation of the premises.

The position is taken by counsel for the defendant that a tenant going into possession under a void lease cannot be compelled to pay rent for any longer period than he actually occupies, and in support of that position, the case of *Thomas v. Nelson*, 69 N. Y. 118, is relied upon, and the following syllabus of that decision is cited: "It seems that a parol lease, void under the statute of frauds because for a longer period than one year, is not valid for that period. If the tenant enters and occupies under it, he may be compelled to pay for the use and occupation, but cannot be compelled, by virtue of the lease, to pay for a longer period than he actually occupies."

The facts of that case are stated in the opinion. The plaintiff alleged a lease for seven years. On the trial, he proved a memorandum made by himself, in which he stated that he was to give Mr. Nelson a lease of the building 271 Broadway for seven years, the first three years at fourteen hundred dollars a year, and four years at fifteen hundred dollars a year. It was said that the memorandum did not embody the contract between the parties, and was not intended to. It simply embraced the main features of the lease, and plainly indicated that a formal lease was subse-

quently to be executed embodying the agreement which the parties had made. The plaintiff was permitted to show a parol agreement for a lease of seven years, and the terms upon which the parties had agreed. The court ruled upon the trial below, in his charge to the jury, that such a lease, although invalid for a term of seven years, was valid for a term of one year. Under these rulings there was no exception, and Mr. Justice Earl, in delivering the opinion of the court of appeals, said: "While such a contract is void, yet if the tenant enters under it and occupies, he may be compelled to pay for the use and occupation of the premises [citing authorities]; but it is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour, or upon what principle a tenant entering under a void lease could be compelled, by virtue of the lease, to pay for a longer period than he actually occupied."

This probably is the language from which the *syllabus* was composed, but a further reading of the opinion will disclose that what the court meant by actual occupation was an occupation under the tenancy, and until it had been legally terminated; for in the next clause the court proceeds as follows: "In August the defendant moved away from the premises, and sent the keys of the house to the plaintiff in a letter, and they were not returned. He claimed, upon the trial, that the retention of the keys was an acceptance of the surrender of the premises. The plaintiff was not bound to seek the defendant and tender a return of the keys. The court held that the mere retention of the keys, which were sent to him without his request or assent, did not of itself amount to a surrender and acceptance, and in this there was no error."

So that it plainly appears that a tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and that the mere vacating of the premises during the term, or while the tenancy exists, does not exonerate him from the payment for the use and occupation of the premises until the relation of landlord and tenant is legally terminated.

The judgment must be affirmed.

LANDLORD AND TENANT. — A parol lease for more than one year is not effectual to vest any term in the lessee, and when he comes into possession with the consent of the lessor, he is a tenant at will: *Talamo v. Spitzmiller*,

120 N. Y. 37; 17 Am. St. Rep. 607, and note. A tenant in possession under a parol lease void by the statute of frauds is a tenant at will, or from year to year: *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462, and note; *Rutan v. Crawford*, 45 N. J. Eq. 99.

LANDLORD AND TENANT — NOTICE TO TERMINATE TENANCY. — To terminate a tenancy at will, the statute requires a notice: *Stickney v. Burke*, 64 N. H. 377.

LANDLORD AND TENANT — ACTION FOR USE AND OCCUPATION. — An action for use and occupation may be maintained by a landlord against a tenant who leaves the premises without giving due notice of his intention to quit: *Walker v. Furbush*, 11 Cush. 366; 59 Am. Dec. 148, and note; *Barlow v. Wainwright*, 22 Vt. 88; 52 Am. Dec. 79, and note; *Schuisler v. Ames*, 16 Ala. 73; 50 Am. Dec. 168; *Adams v. Cohoes*, 127 N. Y. 175.

HUBBELL v. BLANDY.

[87 MICHIGAN, 209.]

EXECUTOR, CONTINUANCE OF ACTION BY. — After the death of a non-resident defendant, against whom judgment has been entered for the conversion of property, his death may be suggested, and the action revived in the name of his executor, who may sue out a writ of error, though it does not appear that the decedent left any property in the state to be administered upon.

BAILEE CONVERTING PROPERTY IS ANSWERABLE THEREFOR, NO MATTER HOW GOOD HIS INTENTIONS, or how careful he has been.

A GRATUITOUS BAILEE OF A CERTIFICATE OF STOCK IS LIABLE FOR ITS CONVERSION, if he, without authority, from its owner, delivers it to the officers of a corporation, who cancel it and issue a new certificate to another person, though such delivery may have been occasioned by a forged order, and the bailee acted in good faith.

Stone and Gray, for the appellant.

T. L. Chadbourne, for the plaintiff.

LONG, J. This is an action of trover for the unlawful conversion by the defendant, Graham Blandy, of one thousand shares of the capital stock of the Colorado Central Consolidated Mining Company, a corporation organized and existing under the laws of the state of New York.

The defendant was a stock-broker doing business in the city of New York. The plaintiff is a citizen of Michigan, and had had business dealings with the defendant prior to 1882. It is conceded that in the fall of 1882 the plaintiff placed the certificate of stock in question in charge of the defendant for safe-keeping. In the fall of 1886 the plaintiff asked the defendant for a list of his stocks then in the possession of defendant. The defendant sent plaintiff a list of the stocks in

his hands, and included the stock in question. On the next day the defendant discovered that he did not have this stock, but that it had been delivered to the officers of the company in the fall of 1884. On the trial it was a disputed question whether the stock had been so delivered by the defendant upon an order of the plaintiff or not, the defendant and his clerk testifying that the stock had been so delivered upon the plaintiff's written order, while the plaintiff testified that he had never given such an order, and if the stock had been so delivered, the order was a forgery. The defendant testified that he took the stock at plaintiff's request, and for his accommodation only.

It was contended by defendant's counsel on the trial that if defendant was a bailee without reward, he was not responsible for the loss of the stock intrusted to him, unless he was guilty of gross negligence, and that this gross negligence must be equivalent to fraud, in order to make him liable in an action; and that a promise by a bailee, without reward, to keep safely does not render him liable for injury or losses occasioned by the acts of wrong-doers. The circuit judge refused to submit that question to the jury, but submitted to the jury one question only, and that was, "Did or did not the plaintiff authorize Mr. Blandy to deliver the stock in question to the officials of the mining company, where Mr. Blandy testified that he did deliver it?"

The jury, having found against the defendant upon this question, returned a verdict in favor of plaintiff for \$4,426.25. Judgment upon this verdict being entered, defendant's executor brings error.

It appears in the case that the defendant died in the city of Brooklyn, New York, four days after the entry of this judgment, leaving a last will and testament. His will having been admitted to probate in this state on March 24, 1891, and letters testamentary having been issued to his executor, Graham F. Blandy, the death of the defendant was suggested of record, and the cause was revived in the name of such executor. The writ of error was sued out by the executor. Plaintiff contends that the executor has no standing in this court, as it does not appear that Graham Blandy left any property within this state to be administered. This point is not well taken. We think this question was ruled by *In re McCarty*, 81 Mich. 460, and *In re Nugent's Estate*, 77 Mich. 500.

But two questions are raised by this record upon the part

of the defendant, and under which his counsel contend the case should be reversed, namely: 1. Did the court err in not submitting to the jury the question whether or not the defendant was a gratuitous bailee; and if so, as to the extent of his liability and degree of care required as such? 2. Did the court err in his instruction to the jury as to the proper measure or rule of damages?

It is contended by defendant's counsel upon the first proposition that Graham Blandy having testified that he received and held the stock solely for the accommodation of the plaintiff, the burden of proof was upon the plaintiff to show that the loss was owing to the bailee's negligence; that, in order to recover, it devolved upon the plaintiff, not only to show a deposit of the stock with defendant, and that defendant did not restore it, but further, to show that the non-restoration was produced by the lack of due diligence on the part of defendant; and that the evidence in the case did not warrant a recovery by the plaintiff. The proposition of defendant's counsel is, that the defendant was a mere gratuitous bailee, and not responsible for losses occasioned by the acts of wrong-doers, and not even for a theft not caused by his own neglect. Counsel cite numerous authorities upon this proposition.

This is an action of trover for the conversion of the property by the bailee. The conversion shown was a transfer and delivery over by Graham Blandy of these shares of stock to the company issuing them, without the consent or authority of the plaintiff. It appears that at the time the stock was delivered over to the company it was of great value, and the plaintiff, by reason of its wrongful delivery to the company, was put in a position where he was unable to recover the stock, and upon the part of Graham Blandy it amounted to a conversion. Demand was made upon him for it, and he wholly failed to replace it. It was held in *Dearbourn v. Union Nat. Bank*, 58 Me. 273, where the bank was intrusted with bonds for safe-keeping, which, when called for, were found to be gone, and the evidence tended to show that they had been lost, stolen, or misdelivered, that trover would not lie, since it could only be by a misdelivery that the bank, under the circumstances, could be held liable, and the misdelivery was not established. In the present case, we think the court very properly left the only question to the jury which could arise; that is, "Did Mr. Hubbell authorize

the delivery?" The finding of the jury that Mr. Blandy delivered the stock without Mr. Hubbell's assent amounts to a finding in fact that he was guilty of the conversion charged.

The cases cited by defendant's counsel, we think, have no application to the present case, under the finding of the jury that Mr. Blandy converted the property, as it would make no difference whether the conversion was to his own use or to the use of another, inasmuch as the plaintiff was thereby deprived of the property. In such cases, the bailee is liable for the value of the property converted, and it makes no difference how good his intentions are, or how careful he may have been in the premises. In *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767, it was said that trover may be maintained against a common carrier, where the goods intrusted to him are lost by his act, though without any wrongful intent, as where he delivers them to the wrong person, by mistake or under a forged order. It is said by Mr. Justice Cooley, in his work on torts (p. 632), that "liability as gratuitous bailee only arises when the trust has once been assumed, . . . but any dealing with the subject of the bailment in a manner not warranted by the understanding is, in law, wrongful. Therefore, if one having undertaken to carry and deliver money for another shall hand it over to a third person to be carried, from whom it is stolen, or by whom it is lost, the loss must fall upon the bailee, who alone was trusted by the owner."

Defendant's counsel also cite, in support of their proposition, *Beller v. Schultz*, 44 Mich. 529; 38 Am. Rep. 280. In that case it appeared that Schultz went to work for Beller, and took two flags with him, — a large one and a small one. He lent the large one to Beller, and helped to put it upon Beller's building. He went away without taking the small one, and permitted the other to remain flying where he had assisted in placing it. Subsequently a hail-storm injured it. He sent for both flags, and received the small one, but failed to receive the other. He sued in *assumpsit* for its value. It was held by this court that there was no cause of action. It was said in that case that the bailment was not shown to have been abused; that there was no proof that Beller failed in his duty. "If there was any want of such care to guard the flag against injury from storms as the law would consider due, which is not probable, it was for Schultz to give evidence to

prove it. He gave none whatever, and it is not to be presumed that Beller was in fault."

In the present case, it appears that the property was actually converted, either to the defendant's use or the use of the company, and that without the consent of the plaintiff.

The second question raised relates to the charge of the court upon the measure of damages, as follows: "In case you decide in favor of the plaintiff, he is entitled to recover such an amount of damages as would legally compensate him for the loss he has sustained by reason of not receiving back his stock, — the loss he has suffered in consequence of Mr. Blandy's default in preserving it for him, and returning it to him; and that would be the price and value of the stock as it was at the time Mr. Hubbell received information from Mr. Blandy of the loss of the stock; and in addition to that, he would be entitled to recover all dividends paid upon the stock from the time it came into his hands — that is, in Mr. Blandy's hands — up to the day when information of its loss was given to Mr. Hubbell, with interest at the rate of six per cent per annum, to be computed on the value of the stock from the date when its loss was made known to Mr. Hubbell, and also to be computed on the dividends at the same rate from the dates when they were respectively payable."

It is contended upon the part of the defendant that this is not the rule by which plaintiff's damages are to be measured; that the conversion occurred, if at all, in the state of New York, and that whatever would be a good defense to the action if brought where the wrong was committed must be a good defense everywhere; that this rule extends to the measure of damages in actions *ex delicto* for wrong or injury to personal property; and that there is no testimony in this case tending to show that defendant acted in bad faith. It is therefore contended that the true measure of damages was what it would have cost the plaintiff to replace the stock within a reasonable time after knowledge came to him of its alleged conversion by the defendant, and that the testimony shows that the value of the stock depreciated from \$3 per share — which was the market value at the time the knowledge came to the plaintiff of its alleged conversion, and the one allowed by the jury — to \$2.60 per share within sixty days from that date, and before the commencement of this suit. August 22, 1887, it had gone down to \$2.20 per share. Counsel cite, in support of their proposition as to the measure

of damages, the case of *Wright v. Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356. That was an action for the conversion of stock owned by the plaintiff. It appears that the defendant acted in good faith in disposing of it, and the rule was there laid down by the court as follows: "Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases that there was good faith on the part of the appellant. It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law."

This is, in substance, the language of the court in that case, which is quoted by defendant's counsel in their brief; but the court went further in the case, and said: "We think that, beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the ninth day of May of the same year. The highest price which the stock reached during that period was \$2,795, and as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time."

Applying that rule to the present case, we think the result reached would not give the plaintiff a less amount of damages than was allowed him under the rule adopted by the court in its charge to the jury. The conversion took place in the fall of 1884, but the plaintiff was not notified of it until the fall of 1886. At that time the stock was of the value of three dollars per share; and if we adopt the rule contended for by defendant's counsel, under the ruling of the court in *Wright v. Bank*, 110 N. Y. 237, 6 Am. St. Rep. 356, at three dollars per share, with interest upon this amount at six per cent upon dividends to which the plaintiff would be entitled, the amount would be no less than the amount of the judgment actually rendered in the case. We therefore see no error in the case, and the judgment must be affirmed, with costs.

EXECUTORS AND ADMINISTRATORS — ABATEMENT — REVIVAL OF ACTIONS. — A suit against a party is abated by his death, but a bill of revivor may be brought against his representatives: *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362, and note. A suit in equity for fraud does not die with the person of the defendant, but may be revived against his representatives: *Schley v. Dixon*, 24 Ga. 273; 71 Am. Dec. 121.

BAILMENT — LIABILITY OF BAILEE FOR CONVERSION. — A gratuitous bailee who by mistake delivers the article to one other than the bailor is liable to him for conversion: *Wear v. Gleason*, 52 Ark. 364; 20 Am. St. Rep. 186, and note; *Graves v. Smith*, 14 Wis. 5; 80 Am. Dec. 762, and note. A bailee who does anything with the property not agreed upon, whereby the owner loses it, is liable to him for its conversion: *Malone v. Robinson*, 77 Ga. 719. This is true of a gratuitous bailee: *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263.

FOR EXTENDED NOTE on the subject of the conversion of personalty, see note to *Bolling v. Kirby*, 90 Ala. 215; *post*, p. 795.

WINTER v. TRUAX.

[87 MICHIGAN, 824.]

SALE BY GUARDIAN AND IMMEDIATE RECONVEYANCE TO HIM. — If a sale and conveyance are made by a guardian of land of his ward, to one who immediately reconveys to the guardian individually for the same consideration, the title of the ward is not divested by these transactions. Hence a subsequent purchaser from the guardian acquires no title.

IF THE TITLE OF A CESTUI QUE TRUST IS DIVESTED, AND INVESTED IN HIS TRUSTEE, and this fact appears on the face of the instruments, there is no presumption of honesty in the transaction, and one who subsequently acquires title from the trustee is not entitled to protection as an innocent purchaser.

Osborn and Mills, for the appellants.

H. H. Markham and T. W. Atwood, for the defendant.

CHAMPLIN, C. J. This is an action of ejectment, brought to recover possession of the equal undivided one half of the northeast quarter of section 10, in township 12 north, of range 8 east, which the plaintiffs claim in fee. The land is situated in the township of Juniata, in the county of Tuscola. The defendant had judgment in the court below, and the plaintiffs bring the case here upon writ of error.

Fourteen errors are assigned, all of which are waived except the eleventh, twelfth, and thirteenth, which read as follows:—

“11. The court erred in charging the jury as follows: ‘I take it, that a sale might be made to a person who was in collusion with the guardian or an administrator, and yet a subsequent purchaser act in good faith. He would be one who

had no knowledge of the collusion; who had not notice of it; was not aware of the want of authority. The question here turns as to whether these proceedings are such as to put Mr. Truax upon notice that there was bad faith in the proceedings.'

"12. The court erred in charging the jury as follows: 'Now, the question of bad faith, even in the purchase,—the purchase at the guardian's sale,—is one entirely of presumption. He presumed it without any proof. Why Wright did afterwards deed to the guardian is possibly explained in the record. It would be an act in the line of the guardian's trust to have taken that deed back again to himself. It would not be a violation of his trust; it would be regularly included in the line of that trust. Taking it while he was guardian, it inured to the benefit of his ward. The trust would be just the same, and there is nothing inconsistent with the actual good faith of a guardian in taking a deed to himself for the purpose of making a more advantageous sale; that is quite often done. A sale is very often made in this state to a party who holds simply in trust, that a guardian or administrator may afterwards make a more advantageous sale by having time. So the question of bad faith by a guardian only is open upon this record, and the question of good faith of Mr. Truax is apparent on the record; that is, he is not charged as a bad-faith purchaser, except constructively by the record; and that turns again upon the question of whether that record affords enough notice, even to an inquiring lawyer, so that he could say that these proceedings were notice of bad faith. . . . This is an ejectment case, and the defendant is in possession, and has made his improvements there. If that construction is to be put upon that particular section of the statute, I prefer the supreme court to put it on. Under this impression of the law, it would be my duty to direct a verdict for the defendant.'

"13. The court erred in directing the jury to find a verdict in favor of the defendant, and as against the plaintiffs."

The facts shown by the record are, that in 1873 Andrew Shultz owned the southwest quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of section 10, township 12 north, of range 8 east, being in Tuscola County, Michigan. On the 14th of January of that year he made his last will and testament, as follows:—

"I, Andrew Shultz, of Juniata, in the county of Tuscola, in the state of Michigan, being of sound mind and memory,

do make and declare this my last will and testament, in manner following, that is to say: I give and devise unto my daughter, Naamah Lucia Shultz, of my farm the following described tracts of land, namely: The north half of the southeast quarter of the northeast quarter of section 10, in township 12 north, of range 8 east, in the county of Tuscola and state of Michigan; to have and to hold the said lands, tenements, and hereditaments, with the appurtenances, to her, the said Naamah Lucia Shultz, her heirs and assigns forever.

"It is my last will that the remainder of my said farm and my personal property be sold at a reasonable time, and at a reasonable price, for the payment of all my just debts and funeral expenses; and that the personal property shall be sold and disposed of by my brother-in-law, Gearhart Kile; and that the real estate, namely, the southwest quarter of the northeast quarter of section 10 aforesaid, be sold by my executor. I do hereby constitute and appoint my friend John Cole executor of this my last will and testament, and I also appoint him guardian of my said daughter and only child."

Afterwards, on the twenty-sixth day of December, 1876, he died, owning the whole of the northeast quarter of section 10. His will was admitted to probate in the probate court of Tuscola County, and John Cole was appointed as executor thereof. It does not distinctly appear from the record, which is very confusing and imperfect, who the heirs at law of Andrew Shultz were. The record of the probate court was offered in evidence, but it is not returned, nor are its contents stated, showing who such heirs were. We are left to presume that the daughter, Naamah Lucia Shultz, was the sole heir, and if so, it is not perceived what use there was for a will. For the purpose of this case, we will assume that she was the sole heir. The record shows that she died, leaving as her heirs two children, viz., Helen E. Tucker and Leonard Sweet. Helen E. Tucker, on the twenty-first day of December, 1877, by deed executed that day, and recorded December 31, 1877, conveyed the whole of the northeast quarter of section 10, township 12 north, of range 8 east, to John S. Lewis for a consideration of four hundred dollars.

The plaintiffs introduced in evidence a copy of the proceedings of the probate court of Geauga County, Ohio, showing that upon February 6, 1878, Helen E. Tucker was, upon an inquest of lunacy, adjudged insane, and Cyrus A. Kellogg appointed her guardian. The order of appointment appoints

Kellogg guardian of her person, but says nothing of guardianship of her property. On the same day a bond was filed, conditioned that Kellogg "shall discharge with fidelity the trust reposed in him as guardian of the person and property of Helen E. Tucker, of the county and state aforesaid, and shall faithfully account with the probate court for the county of Geauga aforesaid for the management of the property and estate, together with the profits ensuing therefrom, to the order of said court or the direction of law, and shall in all respects perform the duty of guardian to the said Helen E. Tucker until discharged as the law requires."

Thereupon, on the same day, letters of guardianship were issued, of which the following is a copy:—

"The State of Ohio, Geauga County, ss.

"*To C. A. Kellogg, of the county and state aforesaid, greeting.*

"Whereas, at a probate court held at the office of the judge of probate in the town of Chardon, within and for said county, on the sixth day of February, A. D. one thousand eight hundred and seventy-eight,—present, H. K. Smith, judge of probate of said county,—it appearing necessary that a guardian should be appointed to take care of the property of Helen E. Tucker, who is demented and insane, of said county, aged sixty-five years, and I, having the fullest confidence in your prudence, fidelity, and circumspect conduct, have, and by these presents do, constitute and appoint you, the said C. A. Kellogg, guardian of the estate of said Helen E. Tucker during her incapacity, unless sooner discharged by the court or the law. You are therefore hereby authorized and required to perform the duty of guardian to the estate of your said ward in all respects in conformity to the laws and statutes in such case made and provided.

[Seal]

"H. K. SMITH,

"Judge of the Court of Probate."

It will be observed that the letters of guardianship appoint Kellogg guardian of the estate, and not of the person, of Helen E. Tucker during her incapacity.

On March 1, 1878, John S. Lewis conveyed the whole of the northeast quarter of section 10 to Cyrus A. Kellogg. This deed was recorded March 25, 1878, and purports to be in consideration of eight hundred dollars. On March 4, 1878, a petition, not signed, but verified by Kellogg, was filed with the probate court of Tuscola County, alleging,—1. That he, Cyrus A. Kellogg, the legal guardian of said insane and in-

competent person, Helen E. Tucker, is the owner of the following real estate, to wit, an undivided half-interest in the northeast quarter of section 10, in the township of Juniata, in said county, which said interest in said real estate is worth two thousand eight hundred dollars; that said Helen E. Tucker has no other property whatever; 2. That it would be for the best interest of his said ward to have said real estate sold, and the proceeds thereof placed at interest; 3. That said ward is indebted to various persons to the amount of fourteen hundred dollars, or thereabouts, and in order to preserve her interest in said land, it is necessary to sell the same, and pay said indebtedness. Therefore he prays that he may be empowered and licensed to sell the real estate described, according to the statute in such case made and provided.

A hearing was had before the probate court on the first day of April, 1878, and the court on that day, in consideration of the premises, ordered, adjudged, and decreed that Cyrus A. Kellogg, guardian as aforesaid, be and thereby was empowered, authorized, and licensed to sell, pursuant to the statute in such cases made and provided, the said real estate, "subject to all encumbrances, by mortgage or otherwise, existing at the time of the granting of this license, and also subject to the right of dower and the homestead rights of the widow of said deceased therein." The court also ordered the guardian to give a bond in the penal sum of four thousand dollars, with two sureties, and to give public notice of the time and place of such sale by posting up notices in three of the most public places in the township of Juniata, and also publish such notice in a newspaper printed in the county of Tuscola for six weeks successively next before such sale, and before making the sale to take the oath prescribed by the statute in such case, and further, to make return of his doings to the court. Afterwards, on the twentieth day of May, 1878, Kellogg filed a bond, with Franklin Fairman and Simeon Wright as sureties, which was approved by the court on that day. He further gave notice of the sale to occur the twenty-fourth day of May, 1878, by posting notices in three public places in the township of Juniata on the twenty-third day of May, 1878, and made an affidavit of such posting on the twenty-fifth day of May, 1878. He also published a notice in the Tuscola Advertiser six weeks, as required. On the twenty-fourth day of May, 1878, he acted as auctioneer, and sold the premises to the highest bidder, to wit, Simeon F. Wright, for

the sum of two thousand two hundred dollars, and made a report of such sale, and of his doings under the license, to the probate court, who duly confirmed the same by an order made on the twelfth day of August, 1878. The deed to Wright was not executed until the 18th of February, 1879, as will be referred to hereafter.

On May 20, 1878, John M. Cole, as executor of the last will of Andrew Shulz, deceased, conveyed to Cyrus A. Kellogg, of Claridon, Ohio, the southwest quarter of the northeast quarter of section 10, township 12 north, of range 8 east, for eight hundred dollars, as appears by said deed.

On February 13, 1879, the guardian's deed was executed by Kellogg to Simeon F. Wright, and was recorded the same day, and on the same day Wright reconveyed to Kellogg individually the same premises for the same consideration, viz., two thousand two hundred dollars, and this deed was recorded on the seventeenth day of February, 1879. On March 12, 1879, Kellogg conveyed by warranty deed the northeast quarter of section 10 to Jacob Truax, the defendant in this suit, for four thousand eight hundred dollars.

On March 1, 1888, Helen E. Tucker died intestate, leaving four children, viz., Mrs. Winter, Mary Griffiths, Susan Strong, and August Shultz. August Shultz Tucker died leaving no issue, nor father nor mother him surviving. On January 19, 1889, Jabez Griffiths and Mary E. Griffiths conveyed by deed to Martha Winter and Susan M. Strong, the plaintiffs in this suit, all of their interest in the land in question.

Cyrus A. Kellogg may possibly have acted throughout without fraud, and for the benefit of his ward, but this record does not show it. So far as he, as guardian, conveyed to Wright, and Wright immediately reconveyed to him, individually, for the same consideration, no title passed by the transaction. This case must be ruled by the case of *McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597. The whole record abounds with evidence of the efforts of Kellogg to get the legal title of this land in his individual name; and aside from the deed from Wright to him, which is void, his transactions would require very satisfactory evidence to explain why he assumed fiduciary relations with the estate of Helen E. Tucker, if he already had a valid title through Cole and Lewis.

Defendant's counsel urge that we should treat the deed to Lewis, and from him to Kellogg, as valid, inasmuch as it

antedates the adjudication of insanity; but aside from the facts apparent on the face of the deed, that Mrs. Tucker conveyed her whole interest in the undivided half of the northeast quarter to Lewis for four hundred dollars, when it was worth more than ten times that amount, we are only required to decide whether the charge of the court with reference to the guardian's deed to Wright, and from him back to Kellogg, is a correct instruction as to the law which should be applied to and govern the case. When the authority appears upon the face of the instruments, there is no presumption of honesty in a transaction by which the title of a *cestui que trust* is divested, and invested in the trustee.

The instructions of the court were erroneous; the judgment is reversed, and a new trial ordered.

GUARDIAN AND WARD. — A transfer of the ward's property by a guardian for his own benefit confers no title, and a purchaser with notice takes it at his peril, and the ward can recover from him: *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 379. A guardian cannot convey land of the ward to pay an attorney for his legal services rendered the estate: *Glasgow v. McKinnon*, 79 Tex. 116. A purchaser at an unaffirmed guardian's sale is liable to the ward for rents and profits: *Ambleton v. Dyer*, 53 Ark. 225. One who assumes the relation of guardian cannot take advantage of his position to speculate in the property of his ward: *Hanna v. Spotts*, 5 B. Mon. 362; 43 Am. Dec. 132, and note.

TRUSTS AND TRUSTEES. — Persons acquiring property bound by a trust, with notice of the trust, do not acquire title, but are considered as trustees: *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 379, and note. Land purchased by a guardian with the trust funds is in equity the property of the ward, and a purchaser of the land is charged with constructive notice of everything recited in the deeds which constitute his chain of title: *Patterson v. Booth*, 103 Mo. 402.

CRIBBS v. SOWLE.

[87 MICHIGAN, 340.]

DURESS EXISTS WHEN there is a fear of imprisonment incited by threats.

RECOVERY OF MONEY EXTORTED BY DURESS. — If a man seventy years of age is threatened with criminal prosecution, and on account of his age and his ignorance of the law, he is so put in fear that his will is overcome and he pays money to another, not of his own free will, but because of the fear, the money is paid under duress, and may be recovered.

Spafford Tryon, for the appellant.

Theodore G. Beaver, for the defendant.

MORSE, J. This is an action of *assumpsit*, upon the common counts, commenced in justice's court. On appeal to the cir-

cuit count for the county of Berrien, the circuit judge directed a verdict for the defendant.

The case made by the plaintiff was substantially as follows: He is a farmer about seventy-two years of age, and has lived in Bainbridge, in Berrien County, upon his present farm, for nearly forty years. There is an orchard on his premises, and he makes and sells cider. He had cider in his cellar in the spring of 1889. The defendant had a mill not far from plaintiff's, and teamsters in his employ drawing logs to the mill. Plaintiff had a sick horse in July, 1889, and called some of these teamsters in to help him about his horse, as they were passing by his place. After they had assisted him to "swing up" his horse, he drew some cider, which he claims had acid in it to keep it from fermenting, and treated them with it. Plaintiff was something of a horse-doctor, and a few days thereafter one Penrod, who was working for defendant with his own team, brought one of his horses to plaintiff to treat for sickness. The horse was brought to his place about four o'clock in the morning, and died in about seven hours. On the second day thereafter, the defendant came into plaintiff's yard, and we give the conversation between them in the language of the plaintiff.

"I was preparing to go to the hay-field. I had cut down quite a lot of clover. I was fixing my hay-rack. Says he, 'Is this Mr. Cribbs?' I told him that was my name. He says, 'I understand you have been selling my men cider, and in consequence one of my men got drunk Saturday before.' I cannot name the date of it, — it was the Saturday before the horse died. 'He run his horse, and caused his death, and I want pay for that horse. I want pay for the horse.' I told him that was a mistake; I never sold any of his men any cider in the world, — not a drop. Says he, 'You have, and I can prove it by six different witnesses that work for me, — men that work for me.' Says I, 'Who are they?' Says he, 'I cannot name them all, I have so many, — a great many mills and so many men. I hire so many men I don't know their names.' He says, 'There are three at the mill, and there are three others that will swear they got cider.' I says, 'That is a mistake.' He says, 'Mistake or not, I want pay for that horse. My teams are lying idle. I have a contract, and that contract has about expired, and unless I can keep my teams at work, I shall lose one thousand dollars on this contract. I cannot give you any time on it. I want it immediately, —

right off.' I says, 'I don't see how you can make that claim. I have no knowledge of their getting any cider that would intoxicate any one, even to the most delicate child there was, or woman.' Says he, 'It has been done, and I have got hold of the man now that I have been looking for, and I want pay for it; my team has got to go to work to-morrow. I cannot run around any more. Unless you do, I shall send you up. I shall fine you, or cause you to be fined, and send you to Grand Rapids.' Says I, 'I don't understand the law.' He spoke in the first place, and says, 'You know as much about law as I do.' I says, 'I never had a case in my life, — never had a lawsuit; I don't know anything about it.' 'Well,' says he, 'I have traveled over the state of Michigan about as much as any other man, and I know about as much law as most lawyers. I have had a great many lawsuits in my lifetime.' Says he, 'That will be the least I can take, and the best I can do with you, and give you no time.' I told him I had no money by me.

"Q. You said something about his having you at Grand Rapids. What did he say about that? A. He would have me arrested and take me to Grand Rapids, in the United States court, and it would imprison me so long a time, and five hundred dollars fine.

"Q. Did he state how long a time? A. Imprisonment?

"Q. Yes. A. I don't know as he came out on the time or years. I don't recollect that he did. He might have said a number of years. 'There will be no chance for you at all; it will be a sure thing.' Said he could prove it by three men down there. Wanted I should go down with him. I says, 'I have no time; my hay is in such a state I want to put my hands to work.' Says I, 'I cannot go.' 'Well,' says he, 'you better go.' 'Better go down,' says he, 'it will save a good deal of expense to you, probably.' So I went down."

Plaintiff admitted to Sowle that he gave the men some cider to drink, but protested that he did not sell it to them, Sowle told him that was enough to condemn him, as it was a sale. Plaintiff said he "could not see it in that light." Sowle replied, "I understand the law as well as most lawyers." Plaintiff and Sowle went down to the mill, and Sowle called up some of his men, and asked them in rotation, "Did you ever buy any cider of Mr. Cribbs?" and each one answered in the affirmative. Considerable more conversation between plaintiff and defendant took between this time and the pay-

ment of the money; Cribbs trying to plead off or reduce the amount, and Sowle, insisting on the sum of \$150 in money, or he would criminally prosecute the plaintiff for selling cider without a license. Finally Cribbs went down to Benton Harbor to get the money. While there he called upon Mr. Wiemer, a druggist, and who had been a sheriff or deputy sheriff of the county, and asked his advice. Wiemer said to him that he "guessed he had got in a boat." Plaintiff then went and got the money, and paid defendant \$150. This is the money he is seeking to recover in this suit.

It was also shown by the testimony of Mr. Penrod, a witness for the plaintiff, that after his horse died, the defendant came to Penrod, and asked him what he was going to do. Penrod replied that he hardly knew what to do. Then Sowle said, "There is just one way that you can get a horse." On being asked how that was, he said that if Penrod would swear that he bought cider of Cribbs, he (Sowle) could go and scare \$150 out of him. Penrod said that he could not do that, as he had never bought any cider of plaintiff. Sowle said the other boys had, and they would swear to it. Penrod also testified that he was present when Sowle called the men up in the presence of the plaintiff, and asked them if they had purchased cider of Cribbs, and heard them answer, "Yes." Plaintiff was also corroborated, as to his conversation in his own yard with Sowle, by Mr. Parker, his hired man, who heard most if not all of the talk there.

The defendant admitted getting \$150 of Cribbs, and that he obtained it by reason of making the charge to him that he had been selling cider to his men, but denied that he had threatened any criminal prosecution. There was no proof in the case that plaintiff's letting the men have cider had anything to do whatever with the killing of the horse belonging to Penrod. The money, under all the testimony, was received by Sowle without any consideration for its payment, except the settlement of a threatened criminal prosecution. But the circuit judge was of the opinion that the plaintiff had "failed to show anything like duress"; and said to the jury that, "under his own testimony, there is nothing that can be called such fear as the law will recognize; and once a man sees fit to enter into an agreement of that kind, he cannot afterwards invoke the aid of the court to rid himself of a place which he has himself been the cause of falling into. Your

verdict, without leaving your seats, will be that you find in favor of the defendant."

The judge, in his remarks to the jury, a portion only of which has been given above, laid stress upon the fact that plaintiff was remarkably strong and robust for one of his years, and had transacted more business than the average man in his walk of life; and also upon the further fact that plaintiff deliberated before the payment of the money, and counseled with a friend, "and paid the money with a full knowledge of all the facts."

The plain case is this: On Sowle's own showing, he has \$150 of plaintiff's money without any consideration, and without the shadow of an excuse for a consideration. If the plaintiff's testimony is true, the money was extorted from him under the threat of a criminal prosecution in the United States court. He testified that he had sold cider by the barrel, and also sweet cider by the pitcherful and half-gallon, but not to any of Sowle's men. He was ignorant of the law, and says that the reason he paid the money was that "Sowle's talk gave me a fright, scared me into it, not knowing anything about the law, never having any occasion to, and he claiming to be quite a lawyer himself, that he could make me. Thought I was compelled in my own mind to do it."

We do not think the plaintiff is debarred from recovering back this money so unjustly obtained from him. He had reason to fear a criminal prosecution when he was threatened with it, and confronted by three or four men who said that they had bought cider of him, and was informed by defendant that they would swear to it. Even if he had the average intelligence and business faculty of people in his walk in life, he can well be excused for thinking that he was in danger of being criminally prosecuted, and perhaps jailed, if he did not settle. He was ignorant of the law, and had a horror of it, especially in the shape it was presented to him by the defendant. The fact that he consulted a friend, who told him he guessed he was in a boat, does not help the defendant any. If it has any bearing, it is in favor of the plaintiff's case. There is no doubt from plaintiff's showing that he was threatened with unlawful arrest and imprisonment; that it excited a fear in him that the threat would be carried into execution if he did not pay the money; that this fear was grounded upon the reasonable belief that the person making the threat had the means of carrying his threat into immediate execution; and that the

threat operated so as to overcome the will of the plaintiff; and we think, under such showing, he was entitled to recover.

As was well said by Gordon, J., in *Jordan v. Elliott*, 15 Cent. L. J. 232: "We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott [in that case] from her contract; for, according to Blackstone, the threats to produce such an effect must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb. And the rule of the civil law was of like import; the fear must be of that kind which would influence a man of the greatest constancy, *Metus non vani hominis, sed qui in homine constantissimo cadat*. . . . But, fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine, which seems to have considered only a very vigorous and athletic manhood, overlooking entirely women and men of weak nerves. Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex, and condition of the parties, since that fear which would be insufficient to influence a man in the prime of life and of military character, might be deemed sufficient to avoid the contract of a woman, or a man in the decline of life: Evans's Pothier on Obligations, 1, 18. And we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England; that is, that any contract produced by actual intimidation ought to be held void, whether as arising from the result of merely personal infirmity, or from circumstances which might produce a like effect upon persons of ordinary firmness." See also Anderson's Law Dict 388.

It has been held by some of the courts that mere threats of criminal prosecution, when neither warrant has been issued or proceedings commenced, do not constitute duress: *Buchanan v. Sahlein*, 9 Mo. App. 552; *Higgins v. Brown*, 78 Me. 473; *Town Council v. Burnett*, 34 Ala. 400; and by others, that a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby: *Knapp v. Hyde*, 60 Barb. 80; *Preston v. Boston*, 12 Pick. 12. But these rules do not seem to have any regard to the condition of the mind of the person acted upon by the threat, or to take into consideration the age, disposition, or intellect of the person so threatened; and leaves the old, the ignorant, the

weak, and the timid at the mercy of the bully or the scoundrel who operates upon their fears to extort money from them. Truly, to such an action as this the defendant, who, without semblance of any legal or moral right or claim, has scared money out of an old man, cannot well set up any defense of the policy of the law that it was the duty of the injured party to have resorted to the courts in the first place, or withstood the threat of being taken there until proceedings were actually begun, to defend himself from the extortion. Nor, in my opinion, is it the true policy of the law to make an arbitrary and unyielding rule in such cases, to apply to all alike, without regard to age, sex, or condition of mind. Weak and cowardly people and old and ignorant persons are the ones that need the protection of the courts, and they are the ones usually operated upon and influenced by threats and menaces.

This case should have gone to the jury, and if they found that the threat of criminal prosecution was made, as claimed by plaintiff, and that he, on account of his age and ignorance of the law, was so put in fear that his will was overcome, and he paid this money, not of his own free will, but because of the fear that he would be unjustly imprisoned on the complaint of Sowle, backed by the testimony of the witnesses he had been confronted with, then the verdict should have been in his favor for the money so paid, with interest.

The modern doctrine of duress is established where actual or threatened violence or restraint contrary to law compels one to enter into or discharge a contract: *Bouvier's Law Dict.* It is duress when there is a fear of imprisonment excited by threats: *Willard's Eq. Jur.* 209. A threat to procure the arrest and imprisonment of one's son under a false and criminal charge, and reasonable ground to believe that such threat will be executed, probably constitute duress: *Schultz v. Culbertson*, 46 Wis. 313; *Meech v. Lee*, 82 Mich. 274. See also *Schultz v. Catlin*, 78 Wis. 611, 946; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 395; *Adams v. Bank*, 116 N. Y. 613; 15 Am. St. Rep. 447; *Green v. Scranage*, 19 Iowa, 461; 87 Am. Dec. 447; *Taylor v. Jaques*, 106 Mass. 291.

The judgment is reversed, and a new trial granted, with costs of this court to plaintiff.

DURESS PER MINAS, WHAT CONSTITUTES. — Threats of unlawful imprisonment, or threats which induce the fear of imprisonment, constitute duress: *Eddy v. Herrin*, 17 Me. 238; 35 Am. Dec. 261; *Dissett v. Robbins*, 74 Tex.

441; *Barrett v. Weber*, 125 N. Y. 18; *Landa v. Obert*, 78 Tex. 23. Threats to sue do not constitute duress: *Jones v. Houghton*, 61 N. H. 51.

DURESS, RECOVERY BACK OF MONEY PAID UNDER. — Money paid to one not entitled thereto, under such duress as gives to it the character of a compulsory payment, may be recovered back: *Chase v. Duval*, 7 Greenl. 134; 20 Am. Dec. 352; note to *Hatter v. Greenlee*, 26 Am. Dec. 374; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447, and note. In the case of *Schifer v. Adams*, 18 Col. 573, where the plaintiff, under duress, executed a check and release of money to defendant, who was a member of a banking firm, and the bank subsequently paid over to defendant on such void check such moneys as were due plaintiff, the court decided that in equity plaintiff might recover of defendant, although he might have maintained an action at law against the bank.

WILSON v. NEWTON.

[87 MICHIGAN, 402.]

A WOMAN MAY BE APPOINTED DEPUTY COUNTY CLERK. — When a ministerial officer is authorized to appoint a deputy clerk, he may, unless restricted by statute, appoint whom he pleases, without regard to age, sex, color, or race.

Durand and Carton, for the relator.

Mark W. Stevens, for the respondent.

CHAMPLIN, C. J. This hearing is upon an order requiring respondent to show cause why he should not quash a writ of attachment, referred to in the affidavit of the relator, for the reason that said pretended writ is void, in that it was prepared, issued, and signed by one Marguerite E. Burr, a deputy county clerk; that said Marguerite E. Burr is a woman, and being so, cannot, under the constitution and laws of the state of Michigan, hold the office of deputy county clerk, or perform any of the duties of that office.

Article 10, section 8, of the constitution provides that in each organized county there shall be chosen by the electors thereof a county clerk, whose duties and powers shall be prescribed by law. The duties and powers of the county clerk are prescribed by Howell's Statutes, secs. 571-577. Other duties are prescribed by other provisions of the law. Section 573 authorizes the county clerk to appoint one or more deputies, to be approved by the circuit judge, one of whom shall be designated in the appointment as the successor of such clerk in case of vacancy from any cause, and to revoke such appointment at his pleasure, and the deputy or deputies may perform the duties of such clerk. The next section makes him and his sureties responsible for the acts of his deputy or

deputies, and in case of vacancy in the office of clerk, by death, etc., the deputies shall severally perform the duties of clerk until the vacancy is filled.

The following is the written appointment of Miss Burr:—

“State of Michigan, Genesee County, ss.

“By virtue of the power in me vested by the statute in such case made and provided, I, George O. Crane, clerk of said county, do hereby constitute and appoint Marguerite E. Burr deputy clerk of said county, to hold office during my pleasure.

“Given under my hand at the city of Flint, Genesee County, this third day of June, A. D. 1889.

“GEORGE O. CRANE, Clerk of Genesee County.

“I approve the above appointment.

“WILLIAM NEWTON, Circuit Judge.”

Miss Burr subscribed and swore to the constitutional oath of office, and entered upon the duties of deputy clerk. It will be noticed that in this appointment she is not designated as successor to the clerk.

The relator contends that under the provision of the constitution none but an elector can be chosen to the office of county clerk. In this I think he is correct, but its decision is not essential to the determination of the present case. He further contends, as a necessary consequence, that no one except an elector can be appointed deputy, for the reason that such person may by the statute and the appointment become successor to the clerk until a vacancy can be filled. Miss Burr is not designated as his successor, and if she were, it does not follow that the successor during the temporary time in which a vacancy occurs must be an elector. The electors have the constitutional right to choose their county clerk, and no one could be appointed for a full term to fill the position in an organized county; but in case of vacancy, the law may provide that another person may be appointed to fill the position and discharge the duties of the office. This is essential for the transaction of the public business, and it is competent for the legislature to provide that the county clerk may appoint his own successor until a vacancy can be filled in the manner provided by law.

The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has

authority to appoint whomsoever he pleases. The person appointed acts for him; or in other words, he acts through his deputy. His choice is not confined to any race, sex, color, or age: *Moore v. Graves*, 3 N. H. 408; *Golding's Petition*, 57 N. H. 146; 24 Am. Rep. 66; *Jeffries v. Harrington*, 11 Col. 191.

There was no error in the denial of the motion to quash the writ.

OFFICE AND OFFICERS—WOMEN.—Under a statute providing that no person shall be precluded or debarred from any occupation, profession, or employment on account of sex, a woman may be a master in chancery: *Schuchardt v. People*, 99 Ill. 501; 39 Am. Rep. 34, and note 26-28, as to what offices may be held by women.

BLODGETT AND DAVIS LUMBER Co. v. PETERS.

[87 MICHIGAN, 428.]

TO DETERMINE THE RIGHTS OF OWNERS OF LANDS ADJACENT TO A BAY OR OTHER NAVIGABLE WATER in the lands and waters lying between their line and the line of navigable waters, or any new line in the bay in front of the lands of such owners, the following general rules are adopted: 1. To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has; 2. To divide the newly formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly formed line.

IN DETERMINING THE RIGHTS OF OWNERS OF LANDS FRONTING ON WATERS IN THE WATERS ADJACENT TO THEIR LANDS, the actual shore line should not be taken as a basis for computation, if it happens to be elongated by deep indentations or sharp projections, but the general line ought to be taken in the same mode that the meanders are run by the United States government.

Sawyer and Waits, for the complainant.

B. J. Brown, for the defendants.

CHAMPLIN, C. J. The complainant is the owner of the following described parcel of land situated in the county of Menominee, in the state of Michigan, viz.: "Commencing at a point on the section line between sections thirty-four (34) and thirty-five (35), in township thirty-two (32) north, of range number twenty-seven (27) west, sixty-four (64) rods north of the quarter-section corner on said line; running thence east to the bay shore; thence northerly along the line

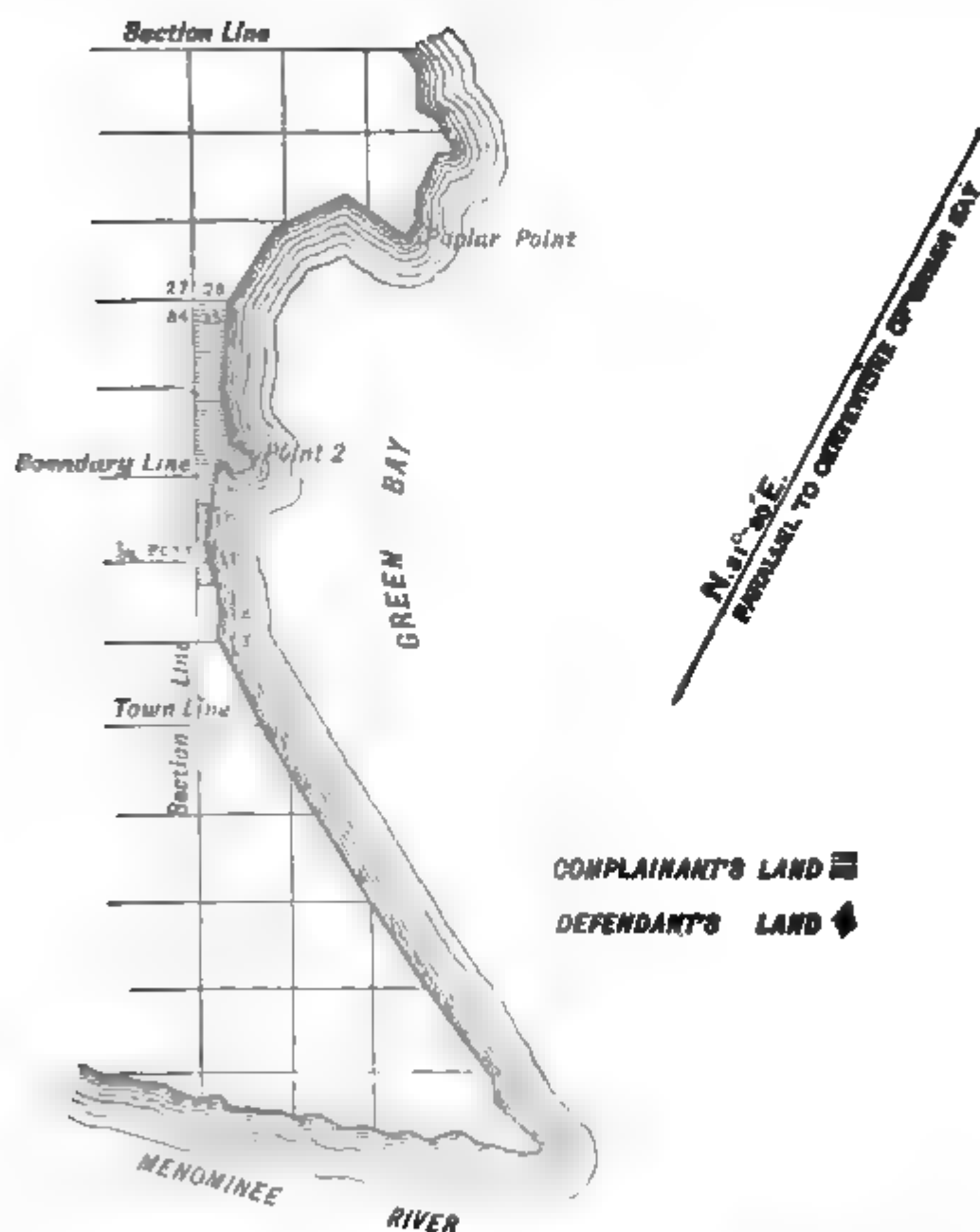
of said bay shore to the section line between sections thirty-five (35) and twenty-six (26); thence west along said section line to the northwest corner of said section thirty-five (35); thence south along the section line between said sections thirty-four (34) and thirty-five (35) to the place of beginning; together with all the riparian rights thereunto belonging or in any wise appertaining."

The defendants are the owners and in possession of the following described lands and premises, adjoining those of the complainant on the south, viz.: "Commencing at a point on the line between sections thirty-four (34) and thirty-five (35), in township thirty-two (32) north, of range twenty-seven (27) west, 208.86 feet south of the quarter-section corner on said line; thence north along said line to a point sixty-four (64) rods north of said quarter-section corner; thence east to the bay shore; thence south along the line of said bay shore to the north line of the property conveyed to A. Spies by the Coleman Lumber Company by deed dated May 15, 1885; thence north, eighty-four degrees and thirty-two minutes west, about four chains, to the place of beginning; together with all the riparian rights thereunto belonging or in any wise appertaining."

The lands border upon the waters of Green Bay, and the question in dispute relates to the division line of the respective holdings under the waters of the bay. Green Bay is part of the waters of Lake Michigan, and is navigable for all classes of vessels. The general course of the center line of the bay is, according to the United States survey, north 31° 30' east. The shore of the bay consists alternately of headlands and bays or coves, of greater and lesser dimensions. The map on the opposite page shows the original shore of the bay, according to the United States government survey.

The land of complainant is shaded with horizontal lines, and the land of defendants with diagonal lines. There is a headland jutting out into the bay, marked on the map as "Point 2." Both parties own and are operating saw-mills, and have constructed wharves to the deep water of the bay, upon which to pile and from which to ship their lumber. The saw-mill of complainant is built about five hundred feet easterly from Point 2, and it has constructed docks from this in a southeasterly direction a distance of nearly seven hundred feet, and at the end of such docks the water is from twelve to fifteen feet in depth. The defendants have also

erected a mill in the bay in front of their premises five hundred feet from the shore line, and have constructed docks which extend in an easterly direction about one thousand feet from the shore line, where the depth of water is from twelve to fifteen feet. They have driven piles with the intention of still farther extending their docks, and for booming logs, and if permitted to do so, the lines of their docks will cross those of complainant, and prevent access to the south



side of complainant's docks, and cut off the land lying between such docks and the land of complainant from the privileges of navigable water. This bill is filed to prevent the execution of such work, and to settle the boundaries between the parties.

The defendants claim in their answer that the boundary line between the respective parties extends into the waters of

Green Bay at right angles to the section line between sections 34 and 35 to the center of the most usual ship canal of the Green Bay.

The cause was heard upon the pleadings and proofs, and the court decreed as follows: "The common boundary between the said lands and premises of the complainant and the said lands and premises of the defendants in the waters, and land lying under the waters, of the Green Bay, of Lake Michigan, within the limits of this decree mentioned, to be as follows: Commencing at a point where a line extended east from a point on the section line between sections thirty-four and thirty-five (34 and 35), in township thirty-two (32) north, of range twenty-seven (27) west, sixty-four (64) rods north of the quarter-section corner on said line, intersects said shore; running thence north, seventy-nine (79) degrees and eight (8) minutes east, one hundred and nineteen (119) feet; thence south, eighty-eight (88) degrees and forty-eight (48) minutes east, two hundred and twenty-nine and four tenths (229 4-10) feet; thence south, eighty-two (82) degrees and three (3) minutes east, two hundred and twenty-nine and four tenths (229 4-10) feet; thence south, seventy-six (76) degrees and fifty-two (52) minutes east, three hundred and forty (340) feet; thence south, eighty-two (82) degrees and twenty-nine (29) minutes east, seven hundred and thirty-six and eight tenths (736 8-10) feet. And it is further ordered, adjudged, and decreed that said complainant, within six months from and after the date of this decree, do remove all piles, pilings, docks, and all other obstructions whatever by it erected or maintained on the said lands and premises of the defendants in the water, or on the lands under the water, of Green Bay aforesaid, south of the common boundary line between the same and the said lands and premises of said complainant, as herein defined and established. And it is further ordered, adjudged, and decreed that the said defendants recover of the said complainant their costs incurred in this suit to be taxed, and that the said defendants have execution therefor."

It appears from the proofs that this line was arrived at by dividing the shore line from Poplar Point to the mouth of the Menominee River into two distinct coves; the headlands of the northern cove being indicated by Poplar Point and Point 2 on the map, and the southern cove by Point 2 and the intersection of the river with the bay. The surveyor, by a series of measurements and surveys, apportioned the distance

upon the base line, drawn from the headland at Poplar Point to the mouth of the river, which the owners of the north cove would have in proportion to the shore line owned by them, and upon the map prepared by him had delineated the division line between the complainant's land and the owner next north of it by course and distance. He also made similar calculations and apportionments between those owning the shore of the south cove. Before the proofs were finally closed the defendants introduced a map upon which was delineated the division line between complainant and its neighbor on the north, as before stated.

Section 35, as will be seen by a reference to the map, is fractional. The part lying north of the east and west quarter line is lot 1, and the part lying south of such line is lot 2, by the government survey. The surveyor who made the map last referred to drew right lines, one from the southeast corner of lot 2 to the point where the quarter line intersects the shore line of the bay, and the other from the northeast corner of lot 1 to the same point. He then projected a line from this point into the bay, dividing the angle made by the intersection of these two lines, and called it a "medium line." Those two lines, running from the corners of lots 1 and 2, did not follow the shore of the bay, but in some places ran across the headlands, and in some places across the water. The line from the corner of lot 1 left the headland at Point 2 wholly upon the bay side. It entirely ignored its existence as a fact of any importance, although it had been used in forming the north cove and the division line of complainant's water rights on the north. The surveyor then projected what he styled a "medium line" from the point where the eighth line of the section, produced east, intersected the shore line, into the bay, which he stated to be a medium line between the north boundary of complainant's water rights and the medium line projected from the quarter-post. He then drew another medium line between these last-named lines, starting it at the point on the shore where the south boundary of complainant's land touched such shore, and this he called the "division line upon the basis of least availability," and this line the court adopted in its decree. This line cannot be correct. The north line from which this medium line is calculated was based upon the full length of the shore of the north cove, and is the line of greatest availability for that cove, but this rule is ignored in getting the medium line on the south.

The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water in proportion to his share on the original shore line of the bay. The lands bordering upon Green Bay derive the greater part of their value from the benefit of the public easement for landing-places, docks, or wharves, in the vicinity of manufacturing establishments, and this is more particularly essential to mill-owners and manufacturers of lumber. Upon consideration of the authorities cited, we think the rule adopted by Massachusetts will, in cases like this, secure a nearer measure of justice than those adopted by the courts of any other state. We cannot deal with Green Bay as we could with the rivers in this state, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundaries of owners of land bordering upon the ocean and great inland seas are more proper for the disposition of the case before us. The rule early defined in Massachusetts is: 1. To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has; 2. To divide the newly formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly formed line.

It is freely admitted that this rule may require modification, under particular circumstances, in order to secure equal justice, and that in ascertaining the shore line or margin of the water, a general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections, so that the line shall embrace the general available line of the shore. This is exactly what the meanders run by the United States government do. The lines are run straight, disregarding indentations and projections which are not available for any general useful purpose. The shore line in this case is a meander line of the government survey, and we have by that survey the available line, not elongated by deep indentations or long projections. The head-line at Point 2 is too important to be disregarded in tracing the shore line. It is nearly of quite one thousand feet in length, and four hundred feet in width. The United States government recognized it as of

sufficient importance to be included in its meander line and computation of quantity of land in lot 1, and it is available for beneficial use and enjoyment, and valuable for manufacturing purposes or a town site. The difficulty is greatest where the shores are irregular.

In the case before us, the waters to be dealt with may be considered a cove from station 6 to station 12, map A, complainant's exhibits. There has been no survey made of the line of navigable water between these two points, which must be done before a final decree can be made. We suppose, however, that such a line will fall within a right line uniting the headlands of the cove as hereinafter described. Based upon this assumption, the proper rule to be applied is that laid down in *Wonson v. Wonson*, 14 Allen, 71; and in following this rule, we direct the following method to be observed, namely: 1. Turn right angles to the shore lines from stations 5 and 6, and 6 and 7, at 6, on the east side thereof. Bisect the angle thus made, and produce a line from the point of intersection to navigable water, say to water fifteen feet in depth that is navigable. 2. Turn right angles to the shore lines from stations 11 and 12, and 12 and 13, on the east side thereof, at 12. Bisect the angle formed by these lines, and produce a line from the point of intersection to navigable water fifteen feet in depth.

The points thus reached upon these lines may be considered the headlands of the cove, between which draw a line upon the general course of navigable water of the depth of fifteen feet, and divide this line of navigable water into as many parts as there are feet on the shore line between stations 6 and 12, and give to the complainant and defendants their proportionate share, according to their ownership of the shore line, and divide their proprietorship by straight lines running from the shore to the line of navigability. The map on page 177 will show the points referred to above.

The decree of the circuit court will be reversed, without costs to either party. The case will be remanded to the court below to take further proof to be made of the general line of navigable water fifteen feet in depth, as indicated above, and proceed to decree in accordance with the method above described.

We do not think this is a case for imposing costs on either party in this court, or in the court below.

RIPARIAN RIGHTS. — Flats lying in a cove are to be divided among the riparian proprietors bounding on the cove by lines drawn from their respective lands to a line drawn across the mouth of the cove, so as to give each the same proportion of that line as he has of the line bounding the cove: *Ashby v. Eastern R. R. Co.*, 5 Met. 368; 38 Am. Dec. 426, and note. But see *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715. Compare *Muiry v. Norton*, 100 N. Y. 426; 53 Am. Rep. 206, and note 215-221; note to *Mather v. Chapman*, 16 Am. Rep. 60 et seq. Where one of two adjacent riparian owners of lands bounded on a cove makes new lands by filling in opposite the lands of both owners, the same rule of division must be followed in apportioning such new-made lands as is applicable to a division of alluvion formed by natural causes: *Watson v. Horne*, 64 N. H. 416.

VAN KLEECK v. HAMMELL.

[87 MICHIGAN, 509.]

ASSIGNMENT BY ONE PARTNER OF HIS PROPERTY FOR THE BENEFIT OF CREDITORS DOES NOT CONVEY PROPERTY OF THE PARTNERSHIP, nor any right to the possession thereof.

ON THE DEATH OF ONE PARTNER, title to the partnership assets vests in the survivor, who, in all matters connected with the partnership, becomes the party to sue and to be sued.

REPRESENTATIVES OF A DECEASED PARTNER have no right to interfere with the partnership property or business, so long as the surviving partner is proceeding in good faith to wind up its affairs.

JUDGMENT AGAINST DEFENDANT AS A SURVIVING PARTNER IS NOT CONCLUSIVE OF THE EXISTENCE OF THE PARTNERSHIP against representatives of a decedent who is claimed to have been a partner of the defendant, though the action was commenced against the defendant and the decedent as partners, the death of the decedent having taken place during its pendency.

IF PARTIES REPRESENT THEMSELVES AS PARTNERS, persons who deal with them as such are entitled to have the property used in the business applied to the payment of their debts, in preference to the individual debts of those representing themselves as partners.

PARTNER CANNOT ESCAPE PARTNERSHIP LIABILITY by showing that he was induced to enter the partnership by false statements of his copartner.

ONE WHO IS A MEMBER OF A PARTNERSHIP, OR WHO HAS PERMITTED HIMSELF TO BE HELD OUT AS SUCH, CANNOT ESCAPE LIABILITY by showing that he consented that the property of the partnership might be assigned as the individual property of his partner.

IF AN ACTION IS COMMENCED AGAINST TWO AS PARTNERS, AND UPON THE DEATH OF ONE OF THEM IS PROSECUTED TO JUDGMENT against the surviving partner without making the representatives of the decedent parties, this is not an abandonment of the right of action against the decedent's estate and its representatives.

ATTACHMENT IS NOT DISSOLVED BY THE DEATH OF ONE OF THE DEFENDANTS, if the action is revived and prosecuted to judgment in the manner provided by law.

L. S. Montague and W. W. Mitchel, for the appellants.

D. Shields, for the plaintiffs.

GRANT, J. Plaintiffs sued the defendant, who is sheriff of the county of Livingston, in trover, for the conversion of the goods seized by him under a writ of attachment issued in the suit of Henry Wright and Orry Waterbury v. John Weimeister and Albert Weimeister, in which the judgment rendered in favor of the plaintiffs has been affirmed by this court: *Wright v. Weimeister*, 87 Mich. 594.

John Weimeister made a general assignment for the benefit of his creditors on September 25, 1889, to the plaintiffs, now his administrators. The assignees took no possession of the property, filed no bond, and made no inventory, for the reason, as they testified, that John Weimeister died before these were completed, and before the time had expired within which they should have completed and filed them. It is unnecessary to consider the effect of this assignment, for it did not purport to convey the partnership property of John Weimeister & Co., if such a partnership existed. The assignees, therefore, would take no title to, and have no right to the possession of, the partnership property. If, therefore, the partnership actually existed between John and Albert, the title to the property belonging to it still remained in the firm, and upon the death of John the title thereto became vested in Albert as the surviving partner. In all matters connected with the partnership he was the proper party to sue and to be sued. If a partner, it became his duty to close up the partnership matters, collect the assets, pay the debts, and then distribute the fund. Until the partnership fund is ready for distribution, the representatives of the deceased partner have no right to interfere, so long as the surviving partner is proceeding in good faith to wind up its affairs: *Barry v. Briggs*, 22 Mich. 201; *Pfeffer v. Steiner*, 27 Mich. 537; *Merritt v. Dickey*, 88 Mich. 41; *Bassett v. Miller*, 89 Mich. 133.

On all other material questions, except the assignment, the evidence is the same in the present case as in that of *Wright v. Weimeister*, 87 Mich. 594, and it is unnecessary to repeat it here. Mr. Hammell was a witness in this case, but not in the other, and does not deny the statements, made by Wright and others, that he informed them that the firm of John Weimeister & Co. was composed of John and Albert.

It is insisted by the defendant that the former suit involved

the same issues as this, and that it therefore concludes the rights of the parties. If John Weimeister had lived till the suit was tried and judgment rendered, the question would have been *res judicata*, both as to him and Albert. It is undoubtedly true that all the acts of a surviving partner, and the result of suits brought by and against him as survivor, are binding upon the representatives of the deceased partner, so long as they are conducted in good faith. But in the present case the existence of the partnership is disputed, and is the real question at issue. This being settled, there can be but little doubt as to the rights of the parties. Upon this question, John Weimeister, in his lifetime, did not have his day in court, nor have his representatives since his death. The judgment in that suit is therefore not binding upon them.

The rights of the parties to this suit depend upon two questions of fact: 1. If John and Albert Weimeister were copartners in fact, then verdict and judgment should be rendered for the defendant. 2. If they were not in fact copartners, but had held themselves out as such, and the plaintiffs in the attachment suit had dealt with them upon the faith of such representations, and in the honest belief that they were copartners, and the property levied upon belonged to the business in which they represented themselves as copartners, then verdict and judgment should be for the defendant.

Persons who deal with parties representing themselves as partners in a business are entitled to have the property used in that business applied to the payment of their debts, in preference to the individual debts of those representing themselves as partners. This rule may operate severely upon the individual creditors, but a contrary rule would operate just as severely upon the partnership creditors.

The testimony of Albert Weimeister, that he was misled by the statements of John as to the value of his property, was incompetent. Whether John intentionally or unintentionally made false statements to Albert, and thus induced him to enter into the partnership, could not affect his liability to those who had meanwhile trusted them. Albert was in a better position than were their creditors to ascertain the assets of John, and their value. He cannot avoid liability by saying John defrauded him.

Plaintiffs introduced evidence tending to show that Albert was present when John executed the assignment, and was

then asked by the attorney for John if he should also execute the assignment, and then he disclaimed having any interest in the property. This might be competent evidence in a controversy between John and Albert, and the fact might estop Albert from laying any claim to the property as against John or his assignees; but this doctrine cannot be invoked by the representatives of John in an adverse proceeding brought by creditors against them both. If they were partners, it was the duty of Albert, as well as of John, to protect the partnership creditors. If they had held themselves out as partners, while not so in fact, the same duty rested upon them both. Albert could not, in either event, avoid this liability by consenting that the property might be assigned as the individual property of John. The same rule also applies to statements made by John at the same time. This testimony should have been excluded.

The circuit judge was in error in instructing the jury that the prosecution of the suit against Albert as survivor was an abandonment of the suit against John, and that the plaintiffs in the attachment suit should have proved their claim against John's estate, or have proceeded in equity to settle the rights of the estate and creditors. We need not determine whether the administrators might properly have been made parties defendant. It is sufficient to say that they were not necessarily parties, and that the action was properly revived against Albert as survivor: *Howell's Stats.*, sec. 7401. They might have presented their claim against the estate, but this would not have operated as an abandonment of their suit: *Manning v. Williams*, 2 Mich. 105.

No attempt was made to obtain a dissolution of the attachment, and it will therefore be presumed that there were valid grounds for the issuance of the attachment. A creditor who, by his diligence in instituting proper legal proceedings, has obtained a lien, is not deprived of it by the death of one of his debtors, when the suit is revived and prosecuted in the manner provided by law. His lien is continued, and upon the rendition of judgment, the property attached may be seized and sold under an execution.

Judgment is reversed, with costs, and a new trial ordered.

PARTNERSHIP — EFFECT OF DEATH OF ONE PARTNER.—The death of a partner puts an end to the partnership: *Schmidt v. Archer*, 113 Ind. 365; and the surviving partner should take possession of the partnership property for the purpose of settling up the firm business: *Durant v. Pierson*, 124 N. Y.

444; 21 Am. St. Rep. 686; *First Nat. Bank v. Payne*, 85 Va. 890; *Walling v. Burgess*, 122 Ind. 299; *Valentine v. Wyser*, 123 Ind. 47. The surviving partner becomes a trustee for the personal representatives of his deceased co-partner, as well as a trustee for himself and the firm creditors: *Killefer v. McLain*, 78 Mich. 249. A surviving partner has power to prosecute claims in favor of the firm, and to do all things necessary to wind up its affairs: *Berson v. Ewing*, 84 Cal. 89. Compare note to *Shields v. Fuller*, 65 Am. Dec. 295-303. All property of a partnership, by the death of one partner, goes to the surviving partner, and in a suit in relation thereto the personal representatives of the deceased partner need not be made parties: *Jones v. Hardesty*, 10 Gill & J. 404; 32 Am. Dec. 180.

PARTNERSHIP — JUDGMENT AGAINST SURVIVING PARTNER.— A judgment against the surviving partner does not bind the personal representatives of the deceased partner: *Hamilton v. Summers*, 12 B. Mon. 11; 54 Am. Dec. 509.

PARTNERSHIP. — LIABILITY OF ONE HELD OUT AS A PARTNER: See *Hable v. Mayer*, 102 Mo. 93; 22 Am. St. Rep. 753, and note 757-764.

ATTACHMENT, DISSOLUTION OF, BY DEATH: See *Waitt v. Thompson*, 43 N. H. 161; 80 Am. Dec. 136, and extended note 139-143.

CANFIELD v. GREAT CAMP OF THE KNIGHTS OF THE MACCABEES FOR THE STATE OF MICHIGAN.

[87 MICHIGAN, 626.]

THE DECISION OF THE TRIBUNALS OF A BENEFIT ASSOCIATION upon the rights of persons presenting death claims may be made final by the laws of such association, and if so made, the courts will not interfere with nor review such decision, there being no claim that the tribunals of the association acted fraudulently, or in any manner contrary to its laws.

Eldredge and Spier, for the appellant.

Markey and Hall, for the defendant.

GRANT, J. This case was tried by the court, and the finding contains the following material facts: Defendant is a mutual benefit association incorporated under Act No. 89, Laws 1893 (3 Howell's Stats., c. 163), for the improvement, morally, socially, and intellectually, of its members, and for the purpose of establishing a benefit fund, from which shall be paid a certain sum to the member, or his widow, or certain other relatives, as he may direct, and as the endowment laws of the order provide. Its constitution provides for a Great Camp, composed of certain officers and one representative from each of the subordinate tents in the state. This Great Camp meets annually, and its members are selected annually. Three of the principal officers constitute the executive committee. Article 18, section 2, of its laws reads as follows:—

"The executive committee shall have power to pass on all death claims, and if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased members thereof, and give them or their attorneys an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness or validity of such claim, and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding upon such claimant, unless an appeal is taken to the Great Camp. The notice of the appeal from the decision of the said committee must be filed with the Great Record Keeper within sixty days thereafter. The decision of the Great Camp in all such cases shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary."

Plaintiff's husband, now deceased, became a member of the defendant, and received what is termed a "half-endowment certificate," which entitled him to receive one assessment on the membership, not exceeding one thousand dollars, as a benefit to his wife, upon satisfactory proof of his death and the surrender of the certificate, provided he shall have in every particular complied with all the rules and regulations of the order. Upon his death, plaintiff presented her claim to the committee, which decided against it, on the ground that at the time of his death he was not a member in good standing, but had been duly and regularly suspended therefrom, in accordance with the rules and regulations thereof. She then appealed to the Great Camp, which also disallowed the claim, after a full examination and hearing. She then brought this suit, and judgment was rendered therein against her.

It is claimed on behalf of plaintiff that the provision above quoted, which makes the decision of the Great Camp final, is contrary to public policy and void, in that it ousts the court of jurisdiction. No charge is made that either the committee or the Great Camp acted fraudulently, or in any manner contrary to the rules and regulations of the order.

I am unable to see any difference between the present case and that of *Van Poucke v. Netherland etc. Society*, 63 Mich. 378. These organizations are purely voluntary, and it may well be considered by their members important that claims of this character should be determined by methods more in-

expensive than resorts to the courts. This reason is well expressed by my brother Champlin in the case above cited.

Plaintiff seeks to maintain a distinction between that case and the present one, in that the plaintiff there was himself a member claiming for "sick-benefits," while the plaintiff here is not a member, and had no voice in the selection of members of the tribunal. Her right depends solely upon the voluntary act of her husband in becoming a member. Her right to receive the benefit depended upon his complying with the constitution and rules, to which he assented, and which became a part of his contract. I can see no reason why a different rule should apply to plaintiff than to a member making a claim for benefits. Similar provisions have been sustained by the courts: *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Toram v. Howard Ben. Association*, 4 Pa. St. 519; *Black etc. Society v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263; *Woolsey v. Independent Order of Odd Fellows*, 61 Iowa, 492; *Rood v. Association*, 31 Fed. Rep. 62.

Judgment affirmed.

BENEVOLENT SOCIETIES — ASSOCIATIONS. — A judgment of the tribunal of a social club rendered in good faith and according to its by-laws is *res judicata*, and will not be reopened by a court of justice: *Commonwealth v. Union League*, 135 Pa. St. 301; 20 Am. St. Rep. 870. The by-laws and articles of association of mutual benefit societies determine the rights of the members and will be enforced: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519, and note; *Anacosta Tribe I. O. R. M. v. Murbach*, 13 Md. 91; 71 Am. Dec. 625. See extended note to *Austin v. Searing*, 69 Am. Dec. 671-678. Courts will not interfere with the internal affairs of benevolent societies, unless property rights are at stake: *People v. Nappa*, 80 Mich. 484; *Goodman v. Jedidjah Lodge*, 67 Md. 117; *Screwman's Ben. Ass'n v. Benson*, 76 Tex. 552.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ST. PAUL NATIONAL BANK v. CANNON.

[43 MINNESOTA, 95.]

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — JUDGMENT AGAINST PLEDGOR, WHEN CONCLUSIVE AGAINST PLEDGEE. — The pledgor of a note who actively consents to the prosecution of an action thereon by pledgor against the maker, and gives the note to the pledgor to produce at the trial as evidence of his right to recover, is estopped by the result of that action, and bound by a judgment entered therein on the merits, against the pledgee.

NEGOTIABLE INSTRUMENTS — DEPOSIT AS PAYMENT OF NOTE — SUBSEQUENT SUIT BY HOLDER. — Where a note is made payable at a certain bank, the mere deposit of money in that bank to be applied in payment of the note is not a payment, unless the holder has deposited it for collection. The bank receives the money merely as agent for such depositor, and the holder, by bringing an action to recover such deposit, does not thereby admit payment of the note, nor is he precluded by such action from afterwards seeking to recover against the maker.

NEGOTIABLE INSTRUMENTS — PLEDGEE AS BONA FIDE HOLDER — LIMIT TO RECOVERY ON NOTE. — Although an indorsee of negotiable paper before maturity, as collateral security for a debt then contracted, stands in the position of a *bona fide* purchaser, and may recover as such against the maker, yet if the latter can show a good defense as to the pledgor, he is entitled to have the recovery limited to the amount of the principal debt for which the collateral security is held.

James H. Foote, for the appellant.

William G. White, for the respondent.

DICKINSON, J. The plaintiff, as an indorsee of a promissory note, seeks by this action to recover thereon against the maker. The note was made by the defendant in April, 1888, payable on or before one year thereafter to one Heiser, at the Bank of

Minnesota. It was conclusively shown by the evidence that before the maturity of the note it was pledged to the plaintiff bank by one Houghtaling as collateral security upon a discounting of Houghtaling's note by the bank. When Houghtaling presented the note as such security it bore the indorsement in blank of the payee, Heiser. It is claimed on the part of the defendant that the plaintiff was barred or estopped by a former action prosecuted by Houghtaling against this defendant to recover on the same note. This was after Houghtaling had transferred the note to this plaintiff as collateral security. It is alleged in defense that in that action judgment was rendered against Houghtaling, on the ground that the note had been paid at maturity. On the trial, the court allowed the defendant to introduce evidence to show that this plaintiff had consented to the prosecution of the action by Houghtaling. Afterwards, and upon the motion of the plaintiff to strike out such evidence on the ground that it did not show such consent, the court struck out the evidence. The striking out of this evidence is one of the grounds of error assigned. We will assume that the answer was sufficient to entitle the defendant to produce this evidence, if the fact sought to be established by it would have constituted a defense. The motion of the plaintiff, and the ruling of the court striking out the evidence, were not based upon the insufficiency of the answer, but on the ground that the evidence did not go to make out a defense. Nor on this appeal is it urged that the evidence should have been stricken out because of any insufficiency in the answer. We are therefore to consider whether this evidence tended to show a defense.

We are satisfied that from the evidence in question it might have been found as facts that Houghtaling commenced the former action without the knowledge or consent of this plaintiff, which then held the note as collateral security; that afterwards, and before the trial of that action, the bank was advised of its pendency, and knew that thereby Houghtaling was seeking to recover against this defendant as the maker of the note, Houghtaling claiming to be the holder of it; that with this knowledge the bank consented to produce the note at the trial, and on the day of the trial did send the note to Houghtaling's attorney, and he produced it on the trial as evidence of the plaintiff's (Houghtaling's) right to recover. If such were the facts, the bank should be now estopped to prosecute

this action, after a judgment on the merits in the former action. By the transfer of the note to the bank as collateral security, Houghtaling had conferred the legal title upon the pledgee, with the right to enforce and make available the security by action against the maker, and thereby the right of Houghtaling to recover on the note was necessarily suspended, for that would be inconsistent with the right of the pledgee, by action on the note, to make the pledged security available: *Lamberton v. Windom*, 12 Minn. 151 (232, 246); 90 Am. Dec. 301. Nor, as it would seem, could the pledgor have successfully maintained that action without the acquiescence and consent of the bank. He could not have shown a right to recover as the holder of the note without producing it, and thus showing that he was the holder: *Armstrong v. Lewis*, 14 Minn. 308 (406). The bank could not well be called upon to produce the note in support of Houghtaling's right of recovery, without being so far informed of the facts that it would be chargeable with notice of the nature of the action. In such case, as the maker ought not to be held doubly liable on the note, both to the pledgor and to the pledgee, it would be the duty of the bank, even though compelled by *subpœna duces tecum*, to produce the note, to disclose its own title, which, as must be assumed, would defeat a recovery by the pledgor. But it is fair to construe the act of the bank in the former action as indicating its consent to so far waive its rights as pledgee as to allow the pledgor to recover in his action against the maker. From its sending the note to Houghtaling's attorney, in order that it might be produced on the trial in support of his right of recovery, the bank forbearing to assert its own right inconsistent with that of Houghtaling in that action, such consent or waiver might be inferred. If the bank thus waived its right, and voluntarily lent its aid to enable the pledgor to recover, the action might properly be maintained by Houghtaling; and after judgment on the merits, whether in favor of Houghtaling or against him, the bank ought not to be heard to say, that because its right to recover on the note had not been adjudicated, it should be allowed to prosecute this action against the same defendant as maker of the note. The doctrine of estoppel *in pais* is applicable. If, under the circumstances, Houghtaling had recovered judgment against the maker for the amount of the note, it would seem plain that this plaintiff ought not to be allowed afterwards to recover a second time against the maker for the same cause

of action. But the principle of estoppel is equally applicable, whether Houghtaling recovered judgment or the defendant succeeded in establishing the defense of payment, or any other defense. He was subject to the necessity of defending and to the risk of a recovery against him. It may, of course, be that the bank could not be prejudiced by an action by the pledgor if it had pursued a course of conduct consistent with the holding to its own rights as a pledgee, and not such as to prejudice the defendant. Indeed, in that case, we do not see how the defendant could have been subject to any risk of a recovery against him in the former action, or to any other prejudice than being compelled to defend an action which the plaintiff had no right to maintain. For that this plaintiff, if without fault in its conduct, could not be held responsible. It is therefore considered that it was error to strike out the evidence relative to the Houghtaling action. This renders a new trial necessary.

Some other questions are involved in the case upon which it is expedient that our opinion be expressed, as they may be expected to arise again upon another trial.

The defense was made that the note had been paid at maturity. The court directed a verdict for the plaintiff, and now the question is presented as to whether the evidence tended to show a payment. The note was secured by a mortgage on real estate, executed by the maker to the payee. It appeared that after the giving of the note and mortgage by the defendant, he sold the mortgaged premises to one Loeffelholz, who assumed the payment of the note. It is alleged in the answer that at maturity Loeffelholz did pay the note at the Bank of Minnesota, "by depositing and leaving with said bank a sum of money sufficient to pay said note and mortgage, and then and there instructing said bank to pay said money to the lawful owner thereof." It is admitted that the money was paid to the Bank of Minnesota by Loeffelholz. The note was not at the bank, but was then held by the plaintiff as collateral security. Although the note was by its terms payable at the Bank of Minnesota, the mere depositing the money in that bank, in order that it might be applied in payment of the note, did not constitute a payment of it. In such a case the bank receiving the money is to be regarded as the agent of the person paying it, the holder of the note not having deposited it at the designated place for collection or payment. The law is well settled: *Adams v. Hackensack Improvement*

Commission, 44 N. J. L. 638; 43 Am. Rep. 406; *Hills v. Place*, 48 N. Y. 520; 8 Am. Rep. 568; *Caldwell v. Cassidy*, 8 Cow. 271; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62; *Wood v. Merchants' Savings etc. Co.*, 41 Ill. 267; *Caldwell v. Evans*, 5 Bush, 380; 96 Am. Dec. 358; *Ward v. Smith*, 7 Wall. 447; *Freeman v. Curran*, 1 Minn. 144 (169); 3 Randolph on Commercial Paper, sec. 1119, and cases cited. The court was therefore right in considering that the case did not show a payment of the note.

There is no claim that the note was paid, unless in the manner above stated. It was therefore not important that this plaintiff afterwards brought an action against the Bank of Minnesota to recover the amount of the note, alleging as the ground on which recovery was sought that the maker had deposited with the defendant bank the money necessary to pay the note, with instructions to pay the same to the lawful holder of the note. This allegation was not an admission that the note had been paid, and the maker's obligation thereby discharged. Nor was this plaintiff precluded by that action from afterwards seeking to recover against the maker. The remedies were not inconsistent, so that resorting to the former should be deemed an election to relinquish the latter.

The defendant was not by the rulings of the court deprived of the right to show that the plaintiff knew that Houghtaling had not good title to the note when he pledged it to the plaintiff; and the evidence presented did not show that the plaintiff, taking the note as collateral security, was not entitled as a *bona fide* purchaser to the benefit of the security. It is urged, however, that the plaintiff's recovery should have been limited to the amount of the principal debt to secure which this note was pledged, and that for the purpose of thus limiting the recovery the defendant should have been allowed to show that Houghtaling acquired the note from one Maxwell, that the title of the latter was defective, and that Houghtaling knew this. Without considering the precise nature of the fact proposed to be proved, which is not very clearly shown in the case, it will be sufficient to say that, as we understand the law to be, although an indorsee of negotiable paper before maturity, as collateral security for a debt then contracted, stands in the advantageous position of a *bona fide* purchaser, and may recover as such against the maker, yet, if the maker can show a good defense as to the pledgor, he is entitled to have the recovery limited to the amount of the

principal debt for which the collateral security is held. Whatever the pledgee recovers in excess of that, he holds for the benefit of the pledgor; and it is apparent that a recovery should not be enforced for the benefit of another when the latter would himself have had no right to recover: *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Chicopee Bank v. Chapin*, 8 Met. 40; Jones on Pledges, secs. 674, 675.

Order reversed.

BANKS AND BANKING — RELATION BANK AND DEPOSITOR. — A bank is not entitled to charge against its depositor's account any sums as payments, unless they have been made in such way as he directed: *Shipman v. Bank of State of New York*, 126 N. Y. 318; 22 Am. St. Rep. 821, and note. See note to *Hawes v. Blackwell*, 22 Am. St. Rep. 870. An indorsement for collection of a draft merely constitutes a bank the agent of the indorser: *National B. & D. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515, and note. A bank has no authority to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds in the bank sufficient to pay it: *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; 10 Am. St. Rep. 669, and note. *Contra*, see *German Nat. Bank v. Foreman*, 138 Pa. St. 474; 21 Am. St. Rep. 908, and note; *Penn. Bank v. Farmers' etc. Bank*, 130 Pa. St. 209.

NEGOTIABLE INSTRUMENTS — PLEDGE OF, AS COLLATERAL SECURITY. — The pledgee of negotiable paper as collateral security is bound to ordinary diligence to preserve the legal validity and pecuniary value of the pledge: *Lamberton v. Windom*, 12 Minn. 232; 90 Am. Dec. 301, and note. It is the duty of a pledgee to safely keep the pledge without any detriment to it or any improper use of it: *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248, and note.

MOON v. NORTHERN PACIFIC RAILROAD COMPANY.

[46 MINNESOTA, 106.]

COMMON CARRIERS — CONNECTING LINES — LIABILITY FOR DELIVERY OF UNSAFE CAR. — Where connecting railroads mutually agree to transport the loaded freight-cars of each over their respective lines, each is under obligation to exercise due diligence in providing reasonably safe cars for the service contemplated. Such duty is not limited to the corporations as such, but extends to and is owed to their servants who must necessarily handle the cars, and who may be exposed to danger arising from their unsafe or defective condition. The carrier neglecting this duty is liable in damages for its negligence.

COMMON CARRIERS — CONNECTING LINES — LIABILITY FOR DELIVERY OF UNSAFE CAR. — Under a mutual agreement between connecting railroads to transport the loaded freight-cars of each over their respective lines, the delivery of its car by one to the servants of the other line is an affirmation that the car is fit for use, and the latter are entitled to repose confidence in the implied assurance that such is the fact.

COMMON CARRIERS — CONNECTING LINES — LIABILITY FOR DELIVERY OF UNSAFE CAR. — Under a mutual agreement between connecting carriers to

transport the loaded freight-cars of each over their respective lines, the receiving company is liable to its employees, if it undertakes to use the cars of the other company without due inspection, and they turn out to be defective and unsafe by reason of defects ascertainable by reasonably careful inspection; but the neglect of the receiving company to perform this duty will not excuse or relieve the delivering company from liability for injuries resulting from its negligence in delivering unsafe and defective cars. Its negligence is the proximate cause of the injury.

COMMON CARRIERS — CONNECTING LINES — LIABILITY FOR DELIVERY OF UNSAFE CAR. — Under a mutual agreement between connecting railroads to carry the loaded freight-cars of each over their respective lines, it is the duty of the delivering carrier to use reasonable diligence in the examination and supervision of appliances on its cars, which, being in constant use, are liable to get out of repair. The measure of care and diligence required must be proportioned to the risk and danger to be apprehended. If the safety of an employee of the receiving carrier depends upon the strength and soundness of such appliances, the failure of the delivering carrier to use reasonable diligence to make and keep them safe, and to make reasonable and adequate inspection before delivery of the cars, is negligence for which it is liable.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY. — In a case involving the question of contributory negligence, upon which the evidence is conflicting, it should be left to the jury to determine.

NEGLECT — DEFECTIVE BRAKE — EVIDENCE. — In an action to recover for negligence in consequence of a defective brake upon a freight-car, by which a brakeman was injured without his fault, a witness who has examined the broken brake, and has been in the hardware business, is competent to testify that in his judgment the "break" was an old fracture.

John C. Bullitt, Jr., and F. S. Kirkpatrick, for the appellant.

Lovely and Trask, for the respondent.

VANDEBURGH, J. Plaintiff's intestate, who was a brakeman in the employ of the St. Paul, Minneapolis, and Manitoba Company, was killed while attempting to set a brake upon a loaded freight-car of the defendant Northern Pacific Railroad Company, which had been transferred by the latter to the track of the Manitoba company in the village of Morris, in this state, for transportation over the road of the latter to a point thereon. There was a traffic arrangement existing between these two companies, in pursuance of which loaded freight-cars were mutually transferred and transported over their respective lines, and cars of the Northern Pacific company destined to points on the Manitoba road were transferred from its line to a side-track in the yard of the latter company at Morris, designated and set apart as a transfer-track, whence, if in good order, they were placed in its trains by that company, and transported to particular stations. The car in question was loaded with wood to be shipped to Her-

man, a station on the Manitoba road a few miles west of Morris. When it arrived at Morris, on the third day of April, it was placed on the transfer-track in the yard of the Manitoba company, above referred to. According to the rule adopted by the companies, such cars were required to be inspected by the car inspectors of both on that track, and if any repairs were needed, they were required to be made by the Northern Pacific company before they were transferred and received by the Manitoba company. Accordingly, this car was so inspected by the car inspectors on the morning of April 4th. It was examined by them together at the same time, and they agreed that it was in good order. In the afternoon of the same day, the car was taken off this track by the Manitoba company, to be placed in a train for transportation, and was switched onto another track, where the conductor ordered the deceased to set the brake on it, so as to hold it securely on a descending grade. The brake-staff proved defective, and was insufficient to hold the loaded car in its place, but broke and precipitated him upon the track, and he was run over. It is claimed by the plaintiff that the brake-staff was cracked and partly broken before its use at the time of the injury, and that the defendant Northern Pacific railroad is liable in damages for negligence in permitting it to be out of repair and unsafe, and also that the car was not properly or carefully inspected by the inspectors of the respective companies, and that the work was superficially and negligently done. The action was brought against both companies, but a verdict was recovered against the Northern Pacific railroad only.

1. We are to inquire whether the relations of the deceased, as an employee of the Manitoba company, to the defendant the Northern Pacific Railroad Company were such as to entitle plaintiff to maintain an action against the latter for its alleged negligence. As respects the transportation of freight in bulk from stations on one line to those on the other, the two roads are operated together, and it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common-law duty as carriers, or by mutual agreement; neither company is obliged to draw the cars of the other over its line if they are unsafe or out of repair: *Mackin v. Boston and Albany R. R. Co.*, 185 Mass. 201; *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 462, 469. It is, then, the primary duty of the company seeking such trans-

portation to use due diligence to provide cars reasonably safe for the service contemplated. The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty. But such duty is not limited to the corporations as such, but extends to and is owed to the servants who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition. One may owe two distinct duties in respect to the same thing, — one of a special character to one person, growing out of special relations to him; and another of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty: 1 Shearman and Redfield on Negligence, sec. 116; Bigelow on Torts, 614.

Subject to proper limitations, the rule, generally stated, is, that if a reasonable man must see that if he did not use due care in the circumstances, he might cause injury to the person or property of another entitled to repose confidence in his diligence, a duty arises to use such care: Smith on Negligence, 12, and notes; *Heaven v. Pender*, 11 Q. B. Div. 503. In this last case, *Winterbottom v. Wright*, 10 Mees. & W. 109, and other cases relied on by the defendant, are explained and distinguished. See also Pollock on Torts, 449. We do not inquire as to the application of the rule here considered to intermediate carriers. The delivery of the car to the servants of the Manitoba company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact.

Undoubtedly, by virtue of the relation of master and servant, the Manitoba company would be liable to its employees if it undertook to use cars of another company without due inspection, and they should turn out to be defective and unsafe by reason of defects which might be ascertained by a reasonably careful inspection: *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 462; *Fay v. Minneapolis etc. R'y Co.*, 30 Minn. 231. But as respects the condition of the car at the time it was delivered, the Manitoba company did not owe the duty of inspection and repair to the Northern Pacific Railroad Company. It might refuse to receive and haul it if not in good condition, but the primary duty to use due diligence to see that the car was then safe and in suitable repair rested upon the latter company, though the Manitoba company might

also be subject to liabilities and duties in respect to the car, growing out of its acceptance, possession, and subsequent use. And the company owning the car should be held responsible for the consequences of its own wrongful or negligent acts or omissions, notwithstanding concurring negligent acts or omissions of the company receiving the car. The negligence of the latter does not excuse or relieve the former from liability for injuries resulting from its negligence.

The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred: 1 Shearman and Redfield on Negligence, sec. 26. And if the original wrong only becomes injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause, and the injury should be imputed to the last wrong, and not to that which is more remote. In order to relieve the first wrongdoer, there must intervene between him and the plaintiff an independent responsible agent, breaking the causal connection: Wharton on Negligence, sec. 438. We do not think such a case is here presented. The duty to exercise due care in the premises devolved on each company. Neither can excuse itself through the default of the other. Besides, in this case the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly between the two car inspectors. The case of *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533, 19 Am. Rep. 421, is, we think, clearly distinguishable: *Burt v. City of Boston*, 122 Mass. 223, 227. And *Child v. Hearn*, L. R. 9 Ex. 176, if in point, would hardly be accepted as authority on the questions here involved: Pollock on Torts, 385. This case also differs from *Sawyer v. Minneapolis etc. R'y Co.*, 38 Minn. 103, 8 Am. St. Rep. 648, in its facts. There the defective car did not come into the hands of the plaintiff by the consent or authority of the owner, but was in the possession of another company, the plaintiff's master, who had undertaken to use it in transporting freight on its own road, after it should have been returned to the company owning it.

2. The brake-staff was not permanently fastened to the car. It consisted of an iron rod about three feet long, with a hand-wheel attached to the upper end, and used to turn or apply the brake, while the lower end was dropped into a socket fixed to the car, and could be lifted out at pleasure. That

part of the lower end which entered the socket was five or six inches in length to the collar, which rested thereon, and was upward of an inch in diameter, and was necessarily subjected to a severe strain in setting the brake, so as to stop or hold a loaded car. It is claimed by the plaintiff that there was a defect or crack near the lower end of the staff, which weakened it and rendered it unsafe, when it was turned over to the Manitoba company, and which caused it to break when the deceased was in the act of setting the brake, and he was, in consequence, suddenly precipitated upon the track and fatally injured. The evidence in the case tends to establish the existence of such defect, and to show that the accident resulted from it. Upon the question of defendant's negligence, the court refused to take the case from the jury, and this is assigned as error. The car was looked over and examined by the inspectors, but their attention was not specially called to the brake-staff, nor was it particularly examined. Neither of them lifted it out of the socket, nor is there evidence of any previous careful examination of it. We think the court did not err in refusing to take the case from the jury. There was also sufficient to send the case to the jury upon the questions whether the defect in the brake complained of existed at all, and if so, whether it had been there a considerable length of time before the accident, whether it was discoverable in the exercise of reasonable diligence by the defendant, and finally, upon the question of the measure of diligence used. One of plaintiff's witnesses, who had examined the staff soon after it was broken, testified that there was an old fracture extending over one third the way across it, and that the new fracture was a continuation of the old. This alleged defect was just below the collar, and inside the socket. It was the duty of the defendant to exercise reasonable diligence in the examination and supervision of such appliances, which, being in constant use, are liable to get out of repair, and the measure of care and diligence must be proportioned to the risk and danger to be apprehended; and if the safety of an employee depended upon the strength and soundness of that portion of the brake-staff in question here, it was the duty of the company to use reasonable diligence to make and keep it safe, and to this end the inspection should have been seasonable and adequate, and should have extended to that portion thereof which rested in the socket. We are unable to say that the evidence did not warrant the

jury in finding that, by the exercise of reasonable care, the defect might not have been seasonably discovered and repaired, and think that this question, which is perhaps left most in doubt of any in the case, was properly submitted to the jury.

The evidence does not conclusively establish contributory negligence on the part of the deceased. It is not necessary to review it. It is enough to say that this question, if raised at all by the evidence, was for the jury.

It is also urged that the court erred in admitting the testimony of the witness Collier in respect to the character of the fracture of the staff, on the ground that no proper foundation had been laid for his testimony. The witness had examined the broken pieces of the rod after the accident, and testified as to their appearance, and stated that he had been in the hardware business, and "knew the difference between an old break and a new one." He was thereupon permitted to testify in respect to the character of this "break," that in his judgment it was an old fracture. There was no abuse of discretion or legal error in allowing the witness to testify. There was some foundation, at least, for his opinion, and its value might be further tested, as it was, by cross-examination.

The case was fairly tried, and submitted to the jury under clear, careful, and impartial instructions. Upon a full examination of the entire record, in connection with the points raised by appellant, we do not feel warranted in overruling the decision of the trial court refusing a new trial.

Judgment affirmed.

RAILROAD COMPANIES — MASTER AND SERVANT. — One railroad company is answerable for injuries suffered by the employees of another railroad company while passing over a track of the former upon a train of the latter, where such injuries were caused by a defective track, or some negligence on the part of the servants of the former: *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410, and note. Compare also *McMarshall v. Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445.

CONTRIBUTORY NEGLIGENCE should be left to the jury when the evidence is conflicting: *Mitchell v. Southern etc. R. R. Co.*, 87 Cal. 62; *Chicago v. McLean*, 133 Ill. 149; *Campbell v. Eveleth*, 83 Me. 50; *Alabama etc. R'y Co. v. Summers*, 68 Miss. 566; *Bonner v. Glenn*, 79 Tex. 532; *Dale v. Webster County*, 76 Iowa, 370; *Tacoma etc. Co. v. Tacoma*, 1 Wash. 12; note to *Deane v. Wilmington etc. R. R. Co.*, 22 Am. St. Rep. 908, 909.

BAUSMAN v. EADS.

[46 MINNESOTA, 148.]

MORTGAGES — FORECLOSURE UNDER POWER — INNOCENT PURCHASER. —

Where a mortgage containing a power of sale has been in fact discharged, it is the duty of the mortgagor or owner of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record. A failure to do this leaves the mortgagee apparently clothed with power to foreclose; and upon foreclosure under such apparent authority, an innocent purchaser, if his evidence of title is first recorded, will be protected. As between him and the mortgagor, the latter is bound by the record.

MORTGAGES — FORECLOSURE UNDER POWER — HEIR ESTOPPED BY NEGLIGENCE OF ANCESTOR. — Where an ancestor neglects for eight years to question the validity of a foreclosure sale under a power in a mortgage, which sale appears by the record to be valid, his heir is estopped to question its validity, as against an innocent purchaser for value, after the death of the ancestor.

VENDOR AND VENDEE — ACTION AGAINST GRANTOR AND HIS GRANTEE — PARTIES. — A grantor by warranty deed sued, together with his grantees, to set aside the title assumed to be conveyed may defend in his own name for his grantees, properly served, but not answering, so as to prevent judgment against them by default.

ACTION to determine adverse claims to real estate. On December 31, 1855, one Moore was the owner of a certain 120 acres of land, and on that day he and his wife executed to one Hall a mortgage thereon, containing a power of sale, to secure the sum of \$227.37, and the mortgage was recorded that day. August 6, 1856, Moore and wife conveyed the land to J. B. Bausman and Z. E. Britton by warranty deed, free from encumbrance, except the Hall mortgage. The consideration for this deed was four thousand two hundred dollars, and it was recorded August 9, 1856. On August 7, 1856, said grantees executed to said Moore two notes, one for \$1,111, due January 8, 1857, the other for \$1,810, due August 7, 1857, and a mortgage on said land to secure the same, which was recorded August 7, 1856. January 27, 1857, Moore assigned this mortgage to one Thomas; and July 10th Thomas assigned it to one French, with the note for \$1,810, the other having been paid, and at that time French purchased the Hall mortgage. June 27, 1857, Bausman and Britton mortgaged the same land to French, to secure the payment of four thousand dollars two years thereafter. This mortgage was recorded July 8, 1857. At the time of the execution of that mortgage, Mercy, wife of said Bausman, also mortgaged to French her interest in the land,

to secure the payment of said four thousand dollars. This mortgage was recorded July 16, 1857. At the time of the execution of these mortgages, French retained enough of the loan to satisfy the Hall and Moore mortgages, upon agreement that he might therewith either pay those mortgages or purchase and hold them for his better security. June 28, 1857, Bausman and Britton conveyed to Harriet C. French five acres of the land; and June 27, 1857, they caused the remainder of the land to be platted as Oakland addition to Minneapolis. On September 15, 1859, the mortgages from the Bausmans and Britton to French were duly foreclosed under the power of sale contained therein, French being the purchaser, except as to the five acres above mentioned. The certificate of sale was duly recorded, and there was no redemption. October 26, 1859, French mortgaged all the land included in the Hall mortgage to one Stevens, to secure the payment of \$28,149.26. This mortgage was recorded November 22, 1859. In October, 1870, an attempt was made by the representative of French, he having died, to foreclose the Hall mortgage under the power of sale contained therein, and one Galusha became the purchaser for a nominal consideration for the benefit of French's estate. The certificate of sale was recorded November 11, 1870. There was no redemption. The foreclosure proceedings were regular, except that the notice of sale was signed only in the name of Hall, who had died several years before. This defect rendered the foreclosure void. November 24, 1871, Galusha conveyed part of the land to the wife of French's executor, the deed being recorded October 18, 1873. August 22, 1876, said grantee and her husband conveyed to the mortgagee Stevens, the deed being recorded February 19, 1881. February 2, 1882, Stevens conveyed the same property to Wheelock, to be managed and sold in the interest of French's creditors, under agreement with all parties, they supposing that Stevens acquired the title in fee under the foreclosure of the Hall mortgage. This deed was recorded February 7, 1882, and a second deed to the same land from Stevens and wife to the grantee, Wheelock, was made October 19, 1882, and recorded November 6, 1882. Under a contract to sell, Wheelock deeded the land to one Bursell on October 27, 1882. On April 4, 1884, Bursell, having paid for the land in full, received and recorded Wheelock's satisfaction of the mortgage given for the purchase price. Bursell, at the time of pur-

chasing, was informed of the Stevens mortgage, and that Wheelock held the title for the benefit of French's creditors, to whom the purchase-money would be paid; and it was so paid. Eads and other defendants became interested with Bursell in the purchase, and furnished part of the consideration, knowing how it was to be applied. In November, 1882, Bursell, Eads, and their associates took possession, and afterwards Bursell conveyed to his associates their respective interests in the land. He and they have since conveyed the land in lots to many purchasers by warranty deeds, with full considerations, and without knowledge or notice of any adverse claim or defect in title. Neither Stevens nor any of the grantees from him down had notice of the defect in the foreclosure of the Hall mortgage until June, 1885. Neither of them had any notice of any payment, or claim of payment, of the Bausmans and Britton mortgage to Moore, or French's mortgage to Stevens, and in purchasing, they relied upon the record, which disclosed an apparently perfect title. In 1859, the value of the land did not exceed sixteen hundred dollars; and in that year Bausman and Britton abandoned the land on account of the encumbrances thereon owned by French, and they never afterwards exercised any act of ownership in respect thereto, nor asserted claim thereto, nor paid any taxes thereon, nor paid any of said encumbrances, or interest thereon. Britton died in 1878, and Bausman in 1882, each leaving a widow and children, no one of whom had any knowledge of said land, or of the transactions in relation thereto, or of the existence or death of Hall, or that they had any claim or color of title to the land, until 1885, when they asserted title. Such title as the heirs of Bausman and Britton had was conveyed to the plaintiffs before this action was brought. October 15, 1885, the widow of Theodore French, then Mrs. Richardson, conveyed the land, except the five acres already conveyed to her, to one Cobb, who then conveyed to plaintiffs by deed recorded December 2, 1885. December 12, 1885, in an action brought by certain heirs of Bausman and Britton against Mrs. Richardson, the plaintiffs herein were adjudged, as against her, to be the owners in fee of the land, except the five acres before mentioned. April 17, 1886, Stevens, by deed, assigned to Bursell the French mortgage, and October 6, 1886, Mrs. Richardson and her husband, by deed, conveyed to Bursell all right to and in the land acquired by her under, through,

or from French. From January, 1860, to 1885, Stevens, Wheelock, Bursell, and his grantees paid the taxes on the land. In 1887 this action was brought by the heirs of Bausman and Britton, and others, against Bursell and his associates, and a number of their grantees, to have plaintiffs declared to be the owners of the land in fee, to declare the foreclosure of the Hall mortgage a nullity and the title acquired thereunder to be void, and that plaintiffs' title be quieted against defendants and each of them. Judgment for defendants. Plaintiffs appealed.

Francis G. Burke and George M. Bennett, for the appellants.

Edward Savage, M. B. Koon, and Shaw, Best, and Cray, for the respondents.

GILFILLAN, C. J. On one of the lines of defense presented by the defendants in this case, to wit, that based on the mortgage from Moore to Hall, and the title derived through the foreclosure of that mortgage, the facts found by the court below are practically identical with those on which this court decided the case of *Bausman v. Faue*, 45 Minn. 412. The plaintiffs assign as error that the evidence does not sustain the findings of fact that it was agreed between Bausman and Britton and French that the latter might purchase the Hall mortgage, and that he did purchase it; and they insist the evidence shows the agreement to have been that, with money of Bausman and Britton retained in his hands, French should pay the mortgage, and that he did pay, but did not purchase it. If the facts were as plaintiffs claim, it would make no difference with the result. Those facts would introduce into the case the feature upon which *Merchant v. Woods*, 27 Minn. 396, was decided. In that case the mortgage had been paid, so that, as between mortgagor and mortgagee, it was extinguished, and there could be no right to foreclose, but it had not been discharged of record. The court held that when a mortgage containing a power of sale has been in fact discharged, it is the duty of the mortgagor or owner of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record; that a failure so to do leaves the mortgagee apparently still clothed with power to foreclose; and that, upon a foreclosure under such apparent authority, an innocent purchaser, if his evidence of title be first recorded,

will be protected. The mortgagor or owner of the equity of redemption cannot rest on the fact that the mortgage has been paid and the power to foreclose extinguished, cannot assume that no attempt will be made to exercise the power, if he permits it to appear by the record to be in full force. As between him and innocent purchasers for value under the power, he will be bound by the record. If the facts were as plaintiffs claim, they would not tend to relieve the owners of the equity of redemption from the charge of negligence and acquiescence, which is an element in the estoppel to dispute the foreclosure. It is unnecessary, therefore, to consider whether, in the particulars so assigned as error, the evidence sustains the findings. So far as we regard the facts to be material, there is no question on them. It is also unnecessary to consider the assignments of error based on rulings of the court, admitting or excluding evidence bearing only on the question whether the mortgage was paid or purchased by French; and as we hold the defense under the Hall mortgage to be established, it is unnecessary to consider any assignments referring to the evidence or facts to establish the other defenses.

The brief of appellants makes the point that there could be no estoppel as to the interest of Charles Claire Britton, an heir of Zenas E. Britton, because, when the latter died, in 1878, Charles Claire was a minor, and it is claimed that a minor cannot be estopped by his laches. The fact that he was a minor does not appear. It is alleged in the complaint, denied in the answers, and the court made no finding upon it, and was not requested to make any. But had the fact appeared, it would not have helped the plaintiffs. A minor may be estopped by the acts and conduct of the ancestor through whom he claims title. The Hall mortgage was foreclosed in 1870. Zenas E. Britton lived till 1878, eight years after the foreclosure, — certainly an unreasonable time to allow the foreclosure to appear valid by the record if he intended to assert his right to the property, if he did not intend to let it go, indifferent what might become of it. Leaving the foreclosure undisturbed for that length of time would justify any one in the conclusion that it was valid; so that a purchaser ignorant of the facts making it invalid might, after such acquiescence, and without taking into account any acquiescence of the heir, rely upon the foreclosure as valid. The heir took his title subject to that condition of things.

The plaintiffs claim that they were entitled to judgment by

default against some of the defendants, who were properly served and did not answer. There is a sufficient reason why they were not entitled to judgment against those defendants. They all derived their titles through warranty deeds from the defendant Bursell, who did appear and defend. As he would be liable to them on his covenants in case of judgment against them setting aside such titles, he had a right to defend and prevent such judgment. It would have been more regular, perhaps, had he done so by answering in their names; but being himself made a defendant, and the title being assailed at a point common to all the defendants, we do not see why he might not defend the titles of all derived through his warranty deeds.

Judgment affirmed.

MORTGAGES — RIGHTS OF PURCHASERS UNDER POWER OF SALE IN. — Innocent purchasers for a valuable consideration from purchaser at a sale under a power contained in a mortgage are not chargeable with notice of irregularities attending the sale: *Hamilton v. Luburkes*, 51 Ill. 415; 99 Am. Dec. 562, and note. An innocent purchaser at a sale under a power in a mortgage is unaffected by any unrecorded agreements: *Beattie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234, and note. The payment of a mortgage by a mortgagor to the mortgagee, without notice of an unrecorded assignment, defeats the claim of the assignee, and entitles the mortgagor to its discharge: *Ingalls v. Bond*, 66 Mich. 338.

AHERN v. FREEMAN.

[46 MINNESOTA, 156.]

SUBROGATION WILL NOT BE ENFORCED to the prejudice of a bona fide innocent purchaser.

EXECUTION SALE — REDEMPTIONER — PURCHASER FOR VALUE. — One redeeming from an execution or mortgage sale is a purchaser for value of whatever interest he acquires by the redemption, as fully as if he had purchased the certificate of sale from the purchaser.

BONA FIDE PURCHASER — NOTICE — RECORD OF SATISFACTION OF MORTGAGE — PRESUMPTION. — Where the record shows that a prior mortgage has been satisfied, without showing by whom payment was made, a purchaser having no other notice than the record may assume that payment was made by the party owing the primary duty to make it; and if the record only discloses that if a certain person paid the mortgage debt he is entitled to subrogation, the purchaser examining the title need not look beyond the record to ascertain whether or not the payment was in fact made by that person.

BONA FIDE PURCHASER — NOTICE OF ENTRIES IN RECORD-BOOKS. — One purchasing land is charged with constructive notice only of such entries in the reception-book or index in the register's office as are by law required to be made.

Williams, Goodenow, and Stanton, for the appellant.

T. R. Palmer, and John B. and W. H. Sanborn, for the respondents.

GILFILLAN, C. J. November 22, 1886, plaintiff purchased from one Wright two lots, and at his request the latter on that day conveyed the same to one Doolittle. Plaintiff paid part of the price, and to secure the remainder Doolittle executed to Wright four notes, and to secure two of them a mortgage on one lot, and to secure the other two a mortgage on the other lot. On said day the deed of conveyance and mortgages were recorded. At the time of the transaction plaintiff verbally agreed with Doolittle to pay the notes, and hold him harmless from liability thereon. April 16, 1887, Doolittle conveyed the lots to one Freeman, by deed which recited that the lots were conveyed subject to the mortgages, and that Freeman assumed and agreed to pay them as part of the purchase price. The deed was recorded May 10, 1887. On said April 16th, Freeman executed to plaintiff his note and a mortgage on the two lots to secure the same, which mortgage was recorded on said May 10th. This mortgage contained the usual covenants, but from the covenant against encumbrances were expressly excepted the aforesaid mortgages to Wright. Afterwards, by deed recorded May 16, 1887, Freeman conveyed the lots to one Zwickey, the deed reciting that the grantee assumed and agreed to pay the mortgages. October 20, 1888, plaintiff foreclosed his mortgage under a power of sale contained in it, and became the purchaser at the sale. January 19, 1889, Tarbox, Schliek, & Co. recovered a judgment, docketed the same day, against Zwickey. November 10, 1888, plaintiff paid the mortgages to Wright, and the latter executed certificates of satisfaction thereof, which plaintiff filed for record, and they were recorded July 17, 1889. September 25, 1889, Tarbox, Schliek, & Co. filed notice of their intention to redeem under their said judgment from said mortgage sale, and they did so redeem October 23, 1889, and on the same day their certificate of redemption was recorded. They made the redemptions relying on the recorded satisfactions, and without notice that the mortgages had been paid by plaintiff. The action is, in effect, for a personal judgment against Freeman and Zwickey for the amount paid by plaintiff upon the mortgages to Wright; that those mortgages be reinstated; that plaintiff be

• adjudged to be subrogated to the rights of the mortgagee, and the mortgages foreclosed. There was no service on Zwickey, so that plaintiff's rights as to him are not involved. The court below rendered judgment in favor of the other defendants.

Plaintiff does not seriously claim here that he has a right to recover against Freeman. We cannot see upon what he could base such a claim, in the face of the exception of the mortgages he has paid from the covenant against encumbrances in Freeman's mortgage to him. His right to foreclose the mortgages must rest on the doctrine of subrogation. Conceding that the mortgages might, in his favor, be held, notwithstanding the discharge of record, to be still in force as between him and Zwickey, it does not follow that they can be enforced as against the interest of Tarbox, Schliek, & Co.; for the right of subrogation will not be enforced to the prejudice of innocent purchasers. One redeeming from execution or mortgage sale is a purchaser for value of whatever interest he acquires by the redemption, as fully as if he had purchased the certificate of sale from the purchaser and paid for it. According to the findings of fact, the redemptioners in this case had no notice of plaintiff's rights unless the record operated as constructive notice. The record does not show that plaintiff paid the mortgages; but the plaintiff claims that it contains enough to put the redemptioners upon such inquiry as, properly followed, would have led to knowledge of plaintiff's rights. The record shows that if the mortgages had been paid by Doolittle, Freeman, or plaintiff, he might be entitled to keep them alive, and enforce them; and if paid by Zwickey, the payment would discharge them,—would have the effect evidenced by the recorded certificates. The certificates do not indicate by whom the mortgages were paid, except, as is the fair inference, that they were paid by one whose right and interest and intention were that the mortgages should be extinguished, and not kept alive. Any one examining the records would have the right to assume without further inquiry that the payment was made by Zwickey, upon whom, as between him and the others preceding him, was the primary duty to pay the mortgages. In other words (having no information but that of record), he would have the right to assume that they were paid by the person who ought to have paid them, just as, where the primary duty of the mortgagor to pay has not been shifted to some one else,

he would have the right to assume that the mortgagor paid. Any other rule would go far to render titles to real estate unsafe.

The plaintiff refers to *Gerdine v. Menage*, 41 Minn. 417, as controlling this. It certainly was not intended in that case to decide that where the record discloses nothing more than that a certain person, if he pay an encumbrance, will be entitled to subrogation, and that the encumbrance has been discharged, it is the duty of the purchaser examining the title to inquire, beyond the record, if the payment was not made by such person. That case was decided upon the showing that the record, in addition to those facts, indicated that the person entitled to subrogation, in case he paid the encumbrance, had paid it.

Plaintiff argues that the redemptioners were put upon inquiry to ascertain who paid the mortgages by an entry in the reception-book in the register's office, to the effect that the certificates of satisfaction were received in that office from Doolittle. They had no actual notice of that entry. If one dealing with real estate is charged with the constructive notice of any entries in the reception-book or in the index, it can only be as to such entries as are required by law to be made. No such entry as is above referred to is required or authorized to be made: Gen. Stats. 1878, c. 8, sec. 177; sec. 180, as amended by Laws 1887, c. 199.

Judgment affirmed.

MORTGAGES — SUBROGATION. — Subrogation will not be made where the rights of innocent purchasers have intervened: *Gerdine v. Menage*, 41 Minn. 417.

MORTGAGES — FORECLOSURE SALE, RIGHTS OF A PURCHASER AT. — Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time of the creation of the lien: *Batterman v. Albright*, 123 N. Y. 484; 19 Am. St. Rep. 510, and note; *Bateman v. Miller*, 118 Ind. 345. The purchaser at a foreclosure sale takes the title which the mortgagee had under which the proceedings were instituted: *Baldwin v. Howell*, 45 N. J. Eq. 689.

STEVENS v. LUDLUM.

[43 MINNESOTA, 100.]

ESTOPPEL IN PARS—WHAT CONSTITUTES. — To create an equitable estoppel, representations need not be made with an actual fraudulent intent. It is sufficient that he who made them knows or ought to know the truth, and makes them intentionally, under such circumstances as show an intention or reasonable anticipation that the party to whom they are made or are to be communicated will rely and act on them as true, and that he has so relied and acted on them so that to permit the former to deny their truth will operate as a fraud.

ESTOPPEL IN PARS—STATEMENT TO COMMERCIAL AGENCY. — One making representations to a commercial agency in relation to his business or the business of any concern with which he is connected must be held to intend that they will be communicated by the agency to any patron who may have occasion to inquire; and when the representations so made are communicated as those of the person making them to a patron of the agency, who relies and acts on them, he may claim an equitable estoppel against the maker.

ACTION against defendant as the "New York Pie Company," on a bill of exchange against him accepted by "New York Pie Company, E. J. White, Mgr." The evidence proved that the bill was drawn for the price of goods sold and delivered by plaintiff; that they were ordered by White in the name of the company, and were delivered after communications made by Bradstreet's and Dun's commercial agencies, and relied upon, that defendant owned the concern carried on in the name of such company; and that the information given by such agencies had been received by them from defendant. Judgment for plaintiff. Defendant appealed.

Gilger and Harrison, for the appellant.

Hubachek and Daly, for the respondent.

GILFILLAN, C. J. The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pie Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows or ought to know the truth, and they are intentionally made, under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their

truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth: *Coleman v. Pearce*, 26 Minn. 123; *Beebe v. Wilkinson*, 80 Minn. 548. Nor need the representations be made directly to the party acting on them. It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one of a particular class, or it may be made to A, to be communicated to B. Any one so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage": *Bigelow on Fraud*, 445. If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him if he had occasion to act on it, is furnished by *Pence v. Arbuckle*, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Any one making representations to such an agency, relating to his business or the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agency to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated as those of the person making them to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel.

The findings of fact in the case are fully sustained by the evidence.

Order affirmed.

ESTOPPEL IN PAIS, WHAT CONSTITUTES — REPRESENTATIONS. — To constitute an estoppel in pais, there must be a false representation or concealment of known material facts made to a party, ignorant of their truth or

falsehood, and made with intent that he would act upon them, and he must have so acted upon them: *Blodgett v. Perry*, 97 Mo. 263; 19 Am. St. Rep. 307, and note; note to *Marines v. Gebel*, 17 Am. St. Rep. 24; note to *Hable v. Mayer*, 22 Am. St. Rep. 758; *Knowles v. Street*, 87 Ala. 357; *Lumber Co. v. Hardware Co.*, 53 Ark. 196; *Maxon v. Lane*, 124 Ind. 592; *Stuart v. Lowry*, 42 Minn. 473; *Nell v. Dayton*, 43 Minn. 242; *St. Louis v. Schulerberg etc. Co.*, 98 Mo. 603; *Trustees etc. v. Smith*, 118 N. Y. 634; *Israel v. Levy*, 45 Ohio St. 256. A representation as to his financial status falsely made by a person to a commercial agency, with a view to obtaining credit, is a representation of a material fact, and not a mere expression of an opinion: *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48; 19 Am. St. Rep. 738, and note.

SHEPHERD v. WARE.

[46 MINNESOTA, 174.]

CONSTITUTIONAL LAW — CONSTRUCTIVE SERVICE UPON UNKNOWN CLAIMANTS TO LAND. — The legislature may, by statute, authorize proceedings by action against unknown claimants, and bind them by constructive or substituted service or notice, in actions to determine adverse claims to real property. Such action is in the nature of a proceeding *in rem*; its object is an adjudication of the state of the title, and the judgment can go no further.

CONSTITUTIONAL LAW — ADVERSE CLAIMS TO LAND — CONSTRUCTIVE SERVICE. — The legislature may, by statute, provide for constructive or substituted service of process, in actions to determine adverse claims to land, as against unknown claimants, or in cases of necessity, or where personal service is impracticable, in actions where the controversy relates to property within the jurisdiction of the court, and with a reasonable exercise of legislative discretion in such matters the courts will not interfere. Such statutes must be strictly construed and followed, to preserve the distinction between known and unknown claimants.

French and Wright, and Williams, Goodenow, and Stanton, for the appellants.

Kingsley and Shepherd, for the respondent.

VANDEBURGH, J. This is an action to recover the possession of certain land described in the complaint, alleged and admitted to be in defendant's possession. Upon the evidence disclosing the claim and title of each party to the premises, the court found in favor of the plaintiff.

It appeared that the plaintiff claims title under one Daniels, from whom he received a conveyance of the premises in 1889. It is found by the court that Daniels, in 1882, by virtue of certain tax sales, had color of title to the land, and in November of that year commenced an action to quiet the title and determine adverse claims under the statute, in which ac-

tion one "Benjamin Human, and all other persons or parties unknown claiming any right, title, or interest in the real property described in the complaint on file in the action, and their unknown heirs," were defendants. The action proceeded against the parties defendant as above described, and the summons was served by publication, in pursuance of the provisions of the General Statutes of 1878, c. 75, sec. 2, as amended by Laws 1881, Ex. Sess., c. 81. The court found that the provisions of that chapter were in all things complied with as to the parties and procedure, and that judgment was rendered by default in Daniels's favor in March, 1888, whereby, among other things, it was adjudged that Daniels was the owner, and entitled to the quiet and peaceable possession, of the premises. The original patentee was Benjamin Homan, who entered the land at the United States land-office in 1856, and to whom a patent was issued in 1857, and the land was certified for taxation by the register of the land-office as entered by Benjamin Human, and the certificate duly filed in the office of register of deeds of the proper county prior to October 31, 1857. No question is raised here upon the mistake in the name of the patentee, recorded as "Human" instead of "Homan." The patent to Homan was not recorded till 1885. The defendant Ware claims title by deed dated in 1885, under mesne conveyances from the patentee, none of which were recorded until 1883. The trial court held that the judgment in the action brought by Daniels against "Human and unknown claimants" bound the defendants, and ordered judgment for the plaintiff herein.

At the time the former action was commenced, the title appeared of record in Homan,—that is to say, no grantee had recorded his deed; but the title had in fact passed to one Bragg, who acquired title through intermediate conveyances in 1879, all of which were recorded with his in 1883. It was necessary, therefore, that Bragg should have been made a party to the suit brought by Daniels in 1882, when the *lis pendens* was filed, in order to make his judgment effectual. But if the suit in form against Homan, in whom the title appeared of record, and the unknown claimants, was sufficient to conclude Bragg, then the record of this notice of *lis pendens*, filed when that suit was commenced, would also bind his grantee in a subsequent deed; that is to say, if the summons in the form published in that action was sufficient notice to Bragg, the judgment therein is valid and binding on Ware.

It being conceded that the statute in question, providing for this mode of service upon unknown claimants in the manner therein provided, was complied with, the only question to determine is, whether the act in question is constitutional. The defendant claims that the procedure is not due process of law, and that the judgment is void. The question, then, is, whether the legislature has the power, in actions to determine adverse claims to real property, to authorize proceedings by action against unknown claimants, and bind them by constructive notice thereof.

It is conceded that constructive or substituted service may be authorized by the state, and resorted to in all actions or proceedings touching real property which are properly denominated actions or proceedings *in rem*. Such are actions to partition real estate, proceedings to enforce the collection of taxes against lands, and for the condemnation of land: *Pennoyer v. Neff*, 95 U. S. 714, 727. Actions *quia timet* in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person, and not upon the property; and in these actions the judgment affects the claim or title to the land, and they are not strictly actions *in rem*. But they concern real estate lying within the jurisdiction of the court, and the state may clothe the court with full power to inquire and adjudicate as to its *status*, title, and ownership; and it is now well settled, that, as respects the procedure provided, and the constructive service of notice, by publication, upon non-resident defendants at least, actions of this kind are to be classed with actions *in rem*: *Arndt v. Griggs*, 134 U. S. 816, 822-826; *Lane v. Innes*, 43 Minn. 137. The question is, not what a court of equity, under its general powers as such, may do, but what the state may authorize in actions to adjudicate the title to real estate. Thus it is said in *Boswell v. Otis*, 9 How. 336, 348, 350: "It is immaterial whether the proceeding against the property be by attachment or by bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but when such a proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character." And "the inquiry should be, Have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court? and is such judg-

ment limited to the property named in the bill?" The judgment can affect the property only, and the defendant is not personally bound beyond it. And such, in substance, is the character of this action. Its object is an adjudication of the state of the title, and the judgment goes no further. And by the procedure under consideration, the proceedings are instituted by filing the complaint, and recording the *lis pendens* against the property, and followed by the publication provided for. This aspect of the question was not considered by this court in its reference to this class of actions in *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547.

It is a case, then, where constructive or substituted service of notice upon adverse claimants may be made. Under the constitution, legal proceedings in the courts are under the direction of the legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of "due process of law" does not necessarily require personal service of notice upon parties resident or non-resident. The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere. Thus attachments are allowed against the property of absconding or concealed debtors within the state, and judgments rendered and their property sold, after notice by publication. Other familiar examples might be cited. "The right of the legislature to make such provision, in proper cases, has never been doubted, but has long been recognized and acted on": Cooley's Constitutional Limitations, 404; *Matter of Empire City Bank*, 18 N. Y. 199, 215; *Burnam v. Commonwealth*, 1 Duvall, 210. Clearly within the rule stated are statutory regulations providing for the service of notice by publication upon unknown heirs and claimants in cases involving the settlement of estates or the title of lands. As in other cases, "where actual notice cannot be given, there must either be no remedy, or constructive notice must be substituted as sufficient, and what constructive notice shall be given is a question of legislative discretion, rather than of power": *Burnam v. Commonwealth*, 1 Duvall, 210. Ordinary civil actions against known residents of the state do not fall within this rule: *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547. Similar provisions are found

in the statutes of several of the states, and their validity is upheld by the courts: Wis. Rev. Stats. 1878, secs. 1208, 8196, 2639; *Truesdell v. Rhodes*, 26 Wis. 215; *Gray v. Gates*, 37 Wis. 614; *Hynes v. Oldham*, 3 T. B. Mon. 266. In the case of *Hollingsworth v. Barbour*, 4 Pet. 466, 475, cited by defendant, there was no statute authorizing constructive service by publication, and the decision rests upon that ground.

The act in question here provides that in actions to determine adverse claims "the plaintiff may include as defendant in such actions, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: 'Also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein.' And service of the summons may be had upon all such unknown persons or parties defendant by publication, as provided by law in case of non-resident defendants": Laws 1881, Ex. Sess., c. 81, sec. 1. The statute further provides that such unknown defendants should have the same rights as defendants named, who are served by publication; that is to say, the same right to appear and defend, before and after judgment. The provisions of a statute upon a subject of so great importance might well have been more complete and definite as respects the procedure to be followed; but this was a matter fairly within the legislative discretion, and the statute is operative and sufficient to authorize the constructive service by publication upon claimants or interested parties who are in fact unknown. But its provisions must be strictly construed and followed. The published summons must contain the names of parties who are known, and those whom the record shows to have some claim, interest, or lien, so as to preserve the distinction between known and unknown parties; and to this end reasonable diligence will be required to ascertain such as are known, in order to comply with the directions of the statute, and effectuate its purpose in the publication of the notice. We think the statutory provisions are sufficient for the purposes intended, and as they were complied with in this case, we must assume that the court had jurisdiction, and the judgment in question was valid.

Judgment affirmed.

THE SUBSEQUENT CASE OF *Ware v. Easton*, 46 Minn. 180, was an action of ejectment by plaintiff, who claimed title from one Bragg, against defendant Easton, who claimed title by virtue of a tax deed in pursuance of a judgment recovered in an action brought under the same statute considered in the principal case, and naming as defendants therein Benjamin Keenan, E. Daniels, and all other persons or parties unknown claiming any right, title, estate, lien, or interest in the land described in the complaint, and their unknown heirs. The summons so entitled was published as in ordinary cases of non-resident defendants, together with a recorded and sufficient notice of *lis pendens*.

Neither of the defendants thus designated by name claimed under the patent title, nor were shown to have any interest in the land, except under tax sales. The patent title to the land issued to one Homan October 31, 1857. In 1863 he conveyed to one Woods, and his title, through mesne conveyances, passed to one Bragg in 1879, who still held this title at the time that the action under the tax title was brought, and judgment recovered, in 1883. The patent and conveyances thereunder were not recorded until 1885.

The court, in delivering the opinion in the action of ejectment, said: "It is claimed that the summons was defective in not naming Homan, the patentee of the land, as one of the defendants; and we think this objection well taken. In so far as the records disclosed, he was the owner of the government title. The defendant was bound to take notice that Homan was the patentee of the land, as well from the government records as those of the county. The important provisions of this statute as a means of notice to the unknown claimants are the designation of the names of interested parties who are known and those who appear such by the records, together with the publication of the notice of *lis pendens* containing a description of the land, and the record of the same. If the land appears to have been entered by Homan, and his grantees, if any, are unknown, and not disclosed by the records, the most effectual notice to those claiming under him would be to name him in connection with the general designation of such unknown claimants. The statute must be strictly construed and followed, and it is enough that it requires such parties to be specially named. If any one appearing by the record to be the owner of the patent title under the original owner is designated, of course it would not be necessary to name any preceding owner under whom he claimed; but he who appears to be the owner of record must be named, unless the actual holder of the title can be discovered and named; that is to say, if it be desired to bind unknown parties claiming some right or interest derived from or under the original patentee of the United States. The same rule would apply, *mutatis mutandis*, to parties claiming a separate title under the state through tax sales. The statute was not complied with in the case under consideration here. The notice was insufficient to bind Bragg, the owner of the patent title at that time, and the judgment is void as to him and those claiming under him."

PROCESS — PUBLICATION — NON-RESIDENTS. — Notice by publication, or other substituted service, may, under statutory provisions, support proceedings *in rem*: *Hegle v. Metz*, 62 Vt. 255; 22 Am. St. Rep. 106; *Beckett v. Owen*, 15 Col. 281; 22 Am. St. Rep. 399. Decrees quieting title, while not strictly *in rem*, partake of the nature of judgments *in rem*, and may therefore be supported by the service of process on a non-resident defendant by publication: *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67, and note. Compare *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547,

and note. Personal service cannot be dispensed with, except in cases distinctly provided for by statute: *Frost v. Atwood*, 73 Mich. 67; 16 Am. St. Rep. 560, and note. Personal judgments cannot be rendered upon service of summons by publication, such service being only authorized in proceedings in rem: *Lydiard v. Okute*, 45 Minn. 277; *Denny v. Ashley*, 12 Col. 165; *York v. State*, 73 Tex. 651; *Bank v. Carter*, 88 Tenn. 279; *Taliaferro v. Butler*, 77 Tex. 578; *Martin v. Cobb*, 77 Tex. 544; *Augusta Savings Bank v. Stelling*, 31 N. C. 260.

GUITERMAN BROTHERS v. SHARVEY.

[46 MINNESOTA, 183.]

SHERIFF — DILIGENCE REQUIRED IN MAKING LEVY — NEGLIGENT DELAY. —

Reasonable diligence is all that is required of a sheriff in making a levy under execution. What is reasonable diligence depends upon the particular facts, in connection with the duty, and a delay from four o'clock of one day to the forenoon of the next may be unreasonable and negligent, in view of the special instructions received and the facts known to the officer, and the apparent necessity for immediate action on his part.

SHERIFF — LIABILITY FOR NEGLIGENT DELAY IN SERVING PROCESS — BUR-

DEN OF PROOF. — The return of an execution wholly unsatisfied, after a negligent delay by the sheriff in making the levy, establishes *prima facie* his liability for the whole amount of the judgment. It is incumbent on him to show, in mitigation of damages, that some part of such judgment might have been collected by the judgment creditor.

McGindley and Cotton, for the appellant.

Mahon and Howard, for the respondents.

MITCHELL, J. Action for damages caused by defendant's breach of official duty in negligently delaying to execute a writ of execution. The assignments of error, although several in number, present the single question whether the evidence justified the findings of fact. The findings are, of course, conclusive in favor of plaintiffs as to all facts upon which there was a fair conflict of evidence. On December 16th, about four o'clock in the afternoon, in Duluth, the plaintiffs, by their attorney, delivered to defendant, sheriff of St. Louis County, an execution against the property of one Crawford. At this time Crawford owned a small stock of goods (sufficient to satisfy the execution) situated in a store in West Duluth. There was regular railway service, as well as a public highway, between Duluth and West Duluth, — which are only four and one half or five miles apart, — by either of which defendant could have reached West Duluth and levied on these goods the same afternoon. When plaintiffs' attorney delivered the execution to defendant, he informed him

where the goods were upon which he desired a levy to be made, and also told him that it was very important that the levy be made that afternoon; that he did not want it postponed until next day, but wanted it made at once, as he was satisfied that Crawford would make an assignment very soon,—in fact, that he was almost certain that the papers for an assignment were being then prepared; also, that if he (the sheriff) was too busy to attend to it, to let him know, so that he might get another officer to serve the execution. The defendant took the writ, saying he would attend to it if he had to go himself that night. The defendant, being engaged in other official duties, gave the execution to one of his deputies, who started to go out by railway that afternoon; but finding that the train which he intended to take had, by reason of a recent change in the time-table, already gone, he deferred going until the next forenoon, when he took the ten-o'clock train, and went out, but on arriving at West Duluth, found Crawford's store closed, and made no levy, and subsequently returned the execution unsatisfied. As a matter of fact, when Crawford made and filed an assignment of all his property for the benefit of creditors on the forenoon of the 17th, between eleven and twelve o'clock. The only excuse which defendant offers for the delay is, that he himself was busy with other official duties; that his deputy had no previous knowledge of the change of railway time; and that the ten-o'clock train was the earliest train which he could have taken the next morning. But it does appear that there was a train at 7:45 of the evening of the 16th, which he might have taken, and there is nothing to show but that it was entirely feasible for him to have driven over by private conveyance, either that afternoon and evening or early the next morning. The law is reasonable in this as in all other things. While it holds public officers to a strict performance of their duties and sanctions no negligence, yet it requires no impossibilities and imposes no unreasonable exactions. Reasonable diligence is all that it requires. But what is reasonable diligence depends upon the particular facts in connection with the duty. If this writ had been delivered to defendant without any special instructions, and without informing him of the facts constituting a necessity for its immediate service, it could hardly be claimed that a delay from four o'clock of one day to the forenoon of the next would constitute negligence. But the question of unreasonable delay is

a mixed question of law and fact, each case depending on its own circumstances; for the speed with which a sheriff should proceed may depend much upon the special instructions which he receives or upon the apparent necessity for quick action. In view of the special instructions given to the sheriff in this case to proceed at once, and the facts communicated to him showing a special urgency for immediate service of the execution, we think the trial court was fully justified in finding that the delay was unreasonable and negligent. We also think that the evidence justified the court in finding that, up to the time he executed the assignment, Crawford had sufficient property to satisfy the execution. This, together with the fact that the defendant subsequently returned the writ wholly unsatisfied, made out a *prima facie* case entitling plaintiffs to recover the full amount of their judgment. If any part of their claim was, or ought to have been, collected out of the proceeds of the assigned property, it was incumbent on the defendant to show it in mitigation of damages.

Order affirmed.

EXECUTION — LEVY — DUTY OF OFFICER. — As to the diligence and celerity required of sheriffs in serving executions and other process, and their liability for loss resulting from want of such diligence, see extended note to *People v. Palmer*, 95 Am. Dec. 423-441; *Franklin County Nat. Bank v. Kimball*, 152 Mass. 331.

HAESLEY v. WINONA AND ST. PETER R. R. Co.

[46 MINNESOTA, 233.]

RAILROADS — MEASURE OF CARE DUE TO CHILDREN NON SUI JURIS. — A railway company is not required to make its premises a safe playground for young children strictly *non sui juris*, nor is it an insurer of their lives and limbs when playing upon its premises; but when it has placed thereon dangerous machinery, attractive, alluring, and open to such children, it must use ordinary and reasonable care to protect them from the danger to which they are thus exposed.

RAILROADS — MEASURE OF CARE DUE TO CHILDREN NON SUI JURIS ON SIDE-TRACK. — A railway company exercises ordinary and reasonable care as to trespassing children of tender years, and strictly *non sui juris*, when it leaves its cars, with their brakes firmly set, upon the grade of its gravitated side-track, a few feet distant from a level surface. It is then relieved of liability for an injury to such children caused by the act of a third person in unloosening such brakes.

Berry and Moray, and Gale and Brown, for the appellant.

Wilson and Bowers, for the respondent.

COLLINS, J. This was an action to recover damages from defendant corporation for personal injuries resulting in the death of plaintiff's intestate, said to have been caused by defendant's negligence. A verdict was had for plaintiff, and the appeal is from an order setting it aside upon the ground that the evidence failed to establish such negligence. As concisely as possible we will state the facts, about which there was practically no controversy. The plaintiff, with his family, resided but a few blocks from the scene of the accident in the city of Winona. The deceased was his son, aged about six years. The defendant owned and operated a switch-track leading southerly from its main line of railway, 2,234 feet to a manufacturing establishment, and there connecting with the switch-track of another company. It was constructed in the year 1883, and it had been the common practice of the defendant to use it as a yard for temporarily storing cars, standing them, with brakes set in the usual manner, at all points along the track. For four hundred feet southerly from the main line the switch-track descended at the rate of one hundred feet to the mile, and from there on it was upon a level, making what is called by railroad men a "gravity" yard,—something quite desirable, in their opinion, as it measurably saves the handling of cars by a locomotive. The plaintiff made no claim upon the trial that defendant was negligent in constructing or maintaining its side-track in this manner. The track ran along an open common much frequented by boys as a playground, and it was shown by the testimony that they would often mount cars standing upon this incline of four hundred feet, unloosen the brakes, and ride as far as the cars would run. When the cars were on the level, some would push them back and forth, while others rode. It was also shown that train-men in defendant's employ had frequently seen boys engaged in this kind of amusement, when trains were passing, and had motioned and shouted to them to desist. No accident had previously occurred, however.

On the day in question, the defendant had placed one car upon the level at the foot of the incline, and two about a rod distant up the grade, the brakes being firmly set, as will hereafter appear. In the afternoon, in company with three boys older than himself, Willie Haesley, plaintiff's son, went over in the vicinity of the side-track, his parents having no knowledge of his going, and, so far as was known, he had never

or that it was its duty to exercise police supervision over its cars when on this particular part of the track, adequate to the danger to be apprehended, — that is, such a supervision as would keep trespassing adults and children able to release a brake off from the same; or that, as to some uses for which a side-track is specially maintained, not only four hundred feet of this, but a part of every other side-track in the land similarly built and situated, must be surrendered and abandoned, in order that they may not prove dangerous, alluring, and attractive to children who have not yet arrived at years of judgment and discretion, but who are old enough to seek out railway cars as proper objects with which to amuse themselves. But if either of these things were demanded of defendant, a most serious burden would be imposed, — a very unreasonable thing, in fact; and in the exercise of ordinary care, nothing unreasonable is required. To be sure, the defendant could have placed its cars upon the level portion of its side-track, although from the testimony it is obvious that precisely this form of accident might have resulted had it done so. Again, it might have stored its cars, when not in use, upon a side-track in the country, remote from habitations, and thus have avoided the danger; but no such vigilance is required. We are of the opinion, to say the least, that when the defendant left its cars with the brakes fastened in the manner indicated by the undisputed testimony, its duty was performed towards plaintiff's intestate.

Order affirmed.

RAILROAD COMPANIES — NEGLIGENCE — CHILDREN. — Railroad companies are responsible for personal injuries to small children in towns and cities, in consequence of their own acts in meddling with railroad turn-tables, left open to public access, unfastened and unguarded, on the company's land, where they are likely to cause injury to children, though harmless if left alone: Note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595, 596; *Ithaco R'y etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 169, and note. But in *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396, it is held that a land-owner is not liable to an infant trespasser injured by a turn-table insecurely guarded, and wrongfully set in motion by older boys who are playing thereon, when the premises on which the turn-table is situated are about sixty feet from any public highway, and on land which is inclosed by a fence.

TRENTOR v. POTHEN.

[46 MINNESOTA, 298.]

CASE PENDENCY. — THE EFFECT OF THE NOTICE OF THE PENDENCY OF A SUIT, DULY FILED AND RECORDED, IS LIMITED TO THE ACTION IN WHICH IT IS FILED; and if that action is dismissed, such notice does not affect any subsequent purchaser, nor charge him with knowledge of anything stated therein.

PRINCIPAL AND AGENT — NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL. — To charge a principal with the knowledge possessed by his agent, the facts of which the agent has knowledge must be within the scope of the agency, so that it is his duty to act upon them or communicate them to his principal.

PRINCIPAL AND AGENT — KNOWLEDGE OF ATTORNEY, WHEN NOT NOTICE TO CLIENT. — One who employs an attorney for the special purpose of examining an abstract of title to property, and giving an opinion thereon, is not chargeable with knowledge of the attorney, acquired in another transaction, of the pendency of a suit which may affect the title to such property.

ACTION by Trentor against one Gregson, for an accounting as to an alleged partnership dealing, growing out of the erection of a double dwelling on a lot owned by them, so that the center partition was upon the line between the north half of the lot owned by Trentor and the south half owned by Gregson. It was also asked that the amount found due plaintiff be declared a specific lien on the entire lot. Gregson afterwards conveyed the south half of the lot to one Pothén, who then intervened and claimed to be a *bona fide* purchaser. The plaintiff had previously brought a suit of the same nature, and had filed a notice of its pendency, which had never been released nor discharged of record, although that action was dismissed prior to the commencement of this; that plaintiff was in possession of the entire lot prior to and since the bringing of the first suit; that the attorney for Gregson in the first suit had examined the title for Pothén at the time of his purchase, and that the latter knew, when purchasing, that the house was occupied by plaintiff, had been built by him and Gregson jointly, and was claimed by plaintiff to be jointly owned by them, and knew of the unsettled accounts between them in relation to the erection of the building as a partnership enterprise. Judgment was rendered in accordance with the prayer in plaintiff's complaint. Gregson appealed.

Ferdinand Barta, for the appellant.

Johns, Michael, and Johns, for the respondent.

MITCHELL, J. The brief for the appellant intervenor is somewhat obscure and disconnected in its statements, but we do not understand counsel to deny that plaintiff would be entitled to a lien on these premises as against the defendant or his grantees with notice; but his contention is, that his client is protected as a *bona fide* purchaser for value. Consequently the only question necessary to be considered is, whether the evidence justified the court in finding that the intervenor purchased with notice of plaintiff's rights. Nothing can be claimed from the notice of *lis pendens*, filed in a former suit, which was dismissed before plaintiff purchased. It was only constructive notice of the pendency of the action in which it was filed. The court found that plaintiff was in possession of the premises when intervenor purchased them, and that this should have put him upon inquiry. The record purports to contain all the evidence, and while we find evidence that plaintiff was in possession of his own premises (the north half of the lot), we are unable to find a particle that he was in possession of defendant's premises (the south half of the lot). Hence the finding cannot be sustained on that ground.

The only other ground upon which it is sought to sustain it is, that the attorney who examined the title to the property for the intervenor before he purchased was also the attorney for the defendant in this action, and that this agent's knowledge of the pendency of the action was in law the knowledge of intervenor.

Whether a principal is only to be affected by the knowledge of his agent, acquired in the course of the business in which the agent was employed, — that is, what the agent learns in the very transaction during and within the agency, — or whether the doctrine of imputed notice to the principal may be extended and applied to knowledge acquired by the agent in a previous or different transaction, is a question that has given rise to much discussion, and upon which there is a conflict of authority: See Ewell's Evans on Agency, c. 7; 16 Am. Law Reg., N. S., 1; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq., 4th Am. ed., 133, note. In accordance with a clear preponderance of authority, we have held that knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency, and while acting for his principal in the particular transaction or matter, will, as respects such transaction or matter, be deemed notice to the principal: *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322.

But while this rule may be a salutary and just one if properly applied, it would be a very dangerous one if applied without proper discrimination. Hence the tendency of the courts is rather to restrict the doctrine of imputed notice, or at least not to extend it, but to reduce it within clear and definite principles.

The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency. In this case it appears from the evidence that the agency was special, and limited to examining an abstract of title, and from that giving the intervenor an opinion as to the sufficiency of defendant's title. In other words, it was the ordinary case of the employment of an attorney to examine the record title, and give an opinion whether or not it is good. We do not suppose it was ever understood that it was within the scope of the agency of an attorney, under such circumstances, to go beyond the record evidences of title and make inquiry of people generally for information as to facts that might affect the title. If a party who employs an attorney for the special purpose of examining an abstract and passing upon the record title is to be charged with notice of all knowledge which the attorney may have previously acquired from other transactions for other parties, it would be very dangerous to employ an attorney at all for any such purpose; and the one whom it would be the most dangerous to employ would be the attorney having the most experience and the most extensive practice. We are of opinion that, in view of the special and limited purpose for which the intervenor employed this attorney, his

knowledge of the pendency of this action cannot be imputed to his principal.

The generally recognized rule that the doctrine of imputed notice will not extend to knowledge of a confidential and privileged nature acquired through previous professional engagements, and which the agent was not at liberty to communicate to his principal, has no application to the present case, for there is nothing confidential or privileged in the mere fact of the pendency of an action.

It would be improper to consider questions which might have been, but are not, raised by counsel; but in view of another trial, we may remark that there is nothing in the case to justify a finding that the plaintiff and defendant owned and held this real estate as partnership property. The most that can be claimed from the evidence is, that they formerly held and owned it as tenants in common, and as such, agreed to unite in the improvement of it. If plaintiff is entitled to recover at all, it must be upon that line.

Judgment reversed.

NOTICE TO AGENT AS NOTICE TO PRINCIPAL. — The general rule is well settled by an unbroken current of authority, that notice to or knowledge of an agent, while the agency exists, and while he is acting within the scope of his authority, is notice to his principal. The multiplication of citations in support of this general rule is unnecessary: *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147; 9 Am. Dec. 736; *Barnes v. McClinton*, 3 Penr. & W. 67; 23 Am. Dec. 62; *Reynolds v. Ingersoll*, 11 Smedes & M. 249; 19 Am. Dec. 57; *Reese v. Houston*, 25 Miss. 591; 59 Am. Dec. 231; *Weisser v. Denison*, 10 N.Y. 68; 61 Am. Dec. 731; *Backman v. Wright*, 27 Vt. 187; 65 Am. Dec. 187; *Farmers' etc. Bank v. Payne*, 25 Conn. 444; 68 Am. Dec. 362; *Hunter v. Watson*, 12 Cal. 377; 73 Am. Dec. 543; *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506; *The Distilled Spirits*, 11 Wall. 356; *Rogers v. Palmer*, 102 U. S. 263; *Saulsbury v. Wimberly*, 60 Ga. 78; *Whitehead v. Wells*, 29 Ark. 99; *Humphreys v. National Benefit Ass'n*, 139 Pa. St. 264; *Roach v. Karr*, 18 Kan. 529; *Little Pittsburg etc. Min. Co. v. Little Chief etc. Min. Co.*, 11 Col. 223; 7 Am. St. Rep. 226; *Morrison v. Ins. Co. etc.*, 69 Tex. 353; 5 Am. St. Rep. 63. This rule is based on the duty of the agent to communicate to the principal his knowledge with reference to the subject of the negotiation, and the presumption that he has performed that duty: *Hummel v. Bank of Monroe*, 75 Iowa, 689; *The Distilled Spirits*, 11 Wall. 356. The knowledge of the agent is chargeable upon his principal whenever the latter, if acting for himself, would have received notice of matters known to the agent within the scope of his authority: *Seoy v. State*, 41 N. J. L. 395.

This general rule has been applied alike to corporations and private individuals under an almost infinite variety of circumstances and in numerous cases. Thus, in addition to the examples given by cases cited above, it may be said that the knowledge of the receiving agent of a common carrier as to the character of the goods taken for transportation is deemed to be the knowledge of

his principal: *Merrill v. American Express Co.*, 62 N. H. 514. Notice to one employed by a master to inspect machinery, that such machinery is defective, is notice to the master: *Dani v. Geisel*, 23 Me. App. 674. So where a consignee is the authorized agent of the consignor to receive money from a carrier as damages for the loss of goods consigned, the consignor, as principal, is charged with notice of what the agent has done, and is bound by a settlement and abandonment of further claim made by the agent: *Seammon v. Wells, Fargo & Co.*, 84 Cal. 811. Where an agent has notice at the time of his purchase for his principal of the equitable rights of another, and of the claim of the latter to have previously purchased the property which is the subject-matter of the sale, this is notice to the principal: *Wattney v. Burr*, 115 Ill. 289. If an agent is clothed with ample powers to buy and sell real estate, institute and defend suits in the name of the principal, actual notice to him in relation to the subject-matter of the agency is actual notice to the principal: *Merriman v. Culham*, 15 Neb. 509; *Coggswell v. Griffith*, 23 Neb. 334. The knowledge of an agent who has sufficient authority to institute an action based upon it charges his principal with notice of all the facts under which he acts: *Compton v. Koman*, 30 Mich. 302. When a party sends another to get certain articles for use, and he gets them, the latter is the agent of the former, and if the party from whom he gets them informs him what his charges will be per day for their use, the principal will be bound to pay such price upon retaining the articles: *Sterling Bridge Co. v. Baker*, 75 Ill. 139. Notice to an agent of the condition of the title to land which he buys for his principal is notice to the principal, whatever the latter's actual knowledge may be on the subject: *Taylor v. Young*, 56 Mich. 285; *Coggswell v. Griffith*, 23 Neb. 334. The knowledge of an agent that a dog in his care as such agent is dangerous is equivalent to knowledge by his principal: *Bries v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454. Where an agent negotiating a sale knows that the purchaser intends to use the purchased article in violation of law, such knowledge is notice to the principal: *Suit v. Woodhall*, 113 Mass. 391. Notice to the agent while he is transacting the business of the agency is constructive notice to his principal; hence a wife is charged with constructive notice of the facts which came to the knowledge of her husband while acting as her agent and trustee in the purchase of property: *Goodbar v. Daniel*, 38 Ala. 588; 16 Am. St. Rep. 76; and notice to a trustee is always notice to his *cotrustees*, and the rule applies to trustees under a mortgage made by a railway company to secure the holders of bonds issued under it: *Crawlish v. Railroad Co.*, 32 W. Va. 244.

As before said, the cases are agreed that notice to or knowledge of the agent, while acting as agent, and within the scope of his authority, is notice to the principal, and has the same effect as though it had been communicated to or acquired by him in person, and whether actually communicated to him by the agent or not. Two different lines of cases, however, support two different theories as to the foundation upon which the rule is based. The line of cases supporting one theory finds the reason of the rule in the legal identity of the principal with the agent; in other words, in the fact that the agent acting within the scope of his authority is, as to the matters embraced therein, for the time being, the principal himself, or the *alter ego* of the principal. Notice to the agent, under such circumstances, is notice to the principal. These cases limit the application of the rule to such notice or knowledge as comes to the agent while he is acting as agent, and they say, in effect, that the agent stands in the place of the principal; that notice

to the former is notice to the latter; but he cannot stand in the place of the principal until the relation of principal and agent is created; and as to all information previously acquired by the agent, the principal is a mere stranger, and not bound. The following cases support this theory: *Wheeler v. McGuire*, 86 Ala. 296; *McCormack v. Joseph*, 83 Ala. 401; *Goodbar v. Daniel*, 88 Ala. 533; 18 Am. St. Rep. 76; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Blumenthal v. Brainerd*, 33 Vt. 402; 91 Am. Dec. 349; *Second Nat. Bank v. Curran*, 36 Iowa, 555; *Day v. Wamsley*, 33 Ind. 145; *Farmers' etc. Bank v. Payne*, 25 Conn. 444; 68 Am. Dec. 262; *Scoy v. State*, 41 N. J. L. 394; *Atchison etc. R. R. Co. v. Benton*, 42 Kan. 696; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Kaufman v. Robey*, 60 Tex. 303; 43 Am. Rep. 266.

In *Houseman v. Girard etc. Ass'n*, 81 Pa. St. 256-262, it was said: "It is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. The limitation of the rule is perfectly well settled by our own cases. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the limitation is a technical one: that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be. Knowledge can be no better than direct, actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our own cases, 'was gained in the transaction in which he was employed.'"

The line of cases which support the other theory, and which we think are based upon the best reasoning, as well as the weight of authority, finds the reason of the rule in the duty of the agent to disclose to his principal all notice and knowledge which he may possess, and which is necessary for the protection of the principal. The law conclusively presumes the agent to have performed this duty, and imputes to the principal whatever notice or knowledge is then possessed by the agent, whether he has in fact disclosed it or not, and whether or not it came to his knowledge during the existence of the agency, or so shortly before its creation as to be presumed to be present in his mind at the time of the transaction in question, so long as he is at liberty to disclose it to his principal. The rule deducible from the authorities which support this theory may be stated to be, that the law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such within the scope of his authority, or which he may have previously acquired, and which he then had in mind, or which he had acquired so recently as to raise the presumption that he still retained it: *The Distilled Spirits*, 11 Wall. 356-367; *Lebanon Savings Bank v. Hellenbeck*, 29 Minn. 322; *Wilson v. Minnesota Ins. Ass'n*, 36 Minn. 112; 1 Am. St. Rep. 659; *Hart v. Farmers' etc. Bank*, 33 Vt. 252; *Patten v. Merchants' etc. Ins. Co.*, 40 N. H. 375; *Slattery v. Schwannecke*, 118 N. Y. 543; *Richardson v. Palmer*, 24 Mo. App. 480; *Mallen v. Mutual etc. Ins. Co.*, 58 Vt. 113; *Yerger v. Barn*, 56 Iowa, 77; *Fuller v. Atwood*, 14 R. I. 293; *Flower v. Rhoad*, 66 Ill. 438; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319; *Constant v. University*, 111 N. Y. 604; 7 Am. St. Rep. 760.

In *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322, it was said: "Knowledge of an agent acquired previously to the agency, but appearing to be actually present in his mind during the agency, and while acting for his principal in the particular transaction or matter, will, as respects such transaction or matter, be deemed notice to his principal, and will bind him as fully as if originally acquired by him." And in *Chouteau v. Allen*, 70 Mo. 290, it was said "that the rule that knowledge of the agent affects the principal is applicable not only to knowledge acquired during the continuance of the agency, but to such as was acquired so shortly before it began as necessarily to give rise to the inference that it remained fixed in the mind of the agent during his employment." Again, in *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361-368, the court said: "But it is said and claimed that, in order to charge the defendant with a knowledge of these facts, the agent must have been acting for it at the time he learned about them; in other words, that unless the agent acquired them in his capacity as agent of the defendant, and while engaged in the transaction of his business, the company will not be bound by it. We see no reason for thus restricting the rule. If the agent, when he renewed the policy, had not forgotten the information which he had received from the assured on these subjects, if he had in his mind these facts concerning the risk, and knew of the existence of the judgments and of the foreclosure suit, why should not this be deemed sufficient and equivalent to a notice to the defendant of the same things? If the agent knew the facts when he was called upon to act for his principal in the matter, that is all we consider necessary. There is no hardship in imputing such knowledge of the agent to the principal. This rule excludes all rumors or loose information coming to the knowledge of the agent, which he is not bound to charge his mind with."

There are certain well-defined exceptions to this rule which are still entirely consistent with it. Thus the notice or knowledge of the agent will not be imputed to the principal when it is such as it is not the agent's duty to disclose it. The test as to whether notice to the agent is notice to the principal is, whether or not the information was of a character which it was the duty of the agent to communicate. If so, it binds the principal, although uncommunicated: *Wood v. Rayburn*, 18 Or. 2.

This exception to the rule is thus laid down in *Fairfield Savings Bank v. Chase*, 72 Me. 226; 30 Am. Rep. 319: "But we think, all things considered, the safer and better rule to be, that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, — so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases. These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where the rule operates harshly, but under the rule reversed, many frauds could be easily perpetrated. Of course, the knowledge must be that of a person who is executing some agency, and not

acting merely in some ministerial capacity, as servant or clerk." So in *The Distilled Spirits*, 11 Wall. 356-367, it was said: "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, — as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, — the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information." This exception is very generally applied to client and attorney, the rule being that a party is not chargeable with notice of facts within the knowledge of his attorney, when the latter acquired knowledge thereof while acting as attorney for another party: *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388; *Herrington v. McCollum*, 73 Ill. 476; *Hood v. Fahnestock*, 8 Watta, 489; 34 Am. Dec. 489; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Bieros v. Red Bluff Hotel Co.*, 31 Cal. 160; *Pepper v. George*, 51 Ala. 190; *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56; *Martin v. Jackson*, 27 Pa. St. 504; 67 Am. Dec. 489; *Templemen v. Hamilton*, 37 La. Ann. 754. And it has been decided that knowledge acquired by an attorney while acting for one client will not affect another client for whom he is acting at the same time, in a different case: *Ford v. French*, 72 Mo. 250. Of course, notice to an attorney is notice to his client, when the notice is gained in the course of the transaction in which the attorney is acting for his client, whether such notice is communicated to the client or not: *Allen v. McCalla*, 25 Iowa, 464; 96 Am. Dec. 56; *Dickerson v. Bowers*, 42 N. J. Eq. 295; *Prestman v. Mason*, 68 Md. 78; *Allen v. Pook*, 54 Miss. 323; *Pepper v. George*, 51 Ala. 190; *Watson v. Sutro*, 86 Cal. 500; *Campbell v. Benjamin*, 69 Ill. 244; *Williams v. Tatnall*, 29 Ill. 553. The better rule would seem to be, that notice to an attorney, however acquired, is notice to the principal, unless acquired under such circumstances as to make it confidential and privileged: *The Distilled Spirits*, 11 Wall. 356; *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 542. Thus where an attorney has notice of a trust, the law will presume that the notice was communicated to the client, and if this knowledge comes to the attorney while acting in another and different transaction, the client will be charged with notice: *Abell v. Howe*, 43 Vt. 403.

While the knowledge of an agent is ordinarily imputed and charged to his principal, it appears to be well established at the present day that there is an exception to the imputation of notice from the agent to the principal in cases of such conduct on the part of the agent as to raise a clear presumption that he would not communicate the fact in controversy; as where the agent, acting nominally as such, is in reality acting in his own or another's interest, and adversely to that of his principal; or where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating: *Atlantic etc. Bank v. Herria*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453; *Innervarity v. Merchants' etc. Bank*, 139 Mass. 332; 52 Am. Rep. 710; *Dillaway v. Butler*, 135 Mass. 479; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 206; 15 Am. St. Rep. 185. In the case last cited it is said, in reference to the general rule that notice to the agent is constructive notice to the principal, that "there is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that the agent will communicate to his principal acts of fraud which he has com-

mitted on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is, that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it." Notice to the agent is not notice to the principal when the agent acts for himself, in his own interest, and adversely to that of his principal: *Frenkel v. Hudson*, 82 Ala. 158; 60 Am. Rep. 736; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; 26 Am. Rep. 784; *Reld v. Bank of Mobile*, 70 Ala. 199. In these cases it is held that notice to the agent, in the transaction of his principal's business, is notice to the principal, whether a corporation or an individual; but to charge such principal with implied notice on account of the actual notice of the agent, it must not be acquired while the agent is engaged in the transaction of his private business adverse to his principal, but must be obtained while employed within the scope of his duty and power in and about the business of his principal. Where the agent is in collusion with a third person to defraud the principal, the latter will not be responsible for the knowledge of the agent in relation to such fraud: *National etc. Ins. Co. v. Minch*, 53 N. Y. 144. "The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not for those who use the agent to further their own frauds upon the principal." The following cases support this exception to the rule: *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33. Notice to an agent, to bind the principal, must be within the scope of the agent's employment, and notice to him of any fact outside the scope of his agency will not affect his principal: *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788; *Smith v. Board of Water Commissioners*, 38 Conn. 208; *Congar v. Chicago etc. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 104; and the notice or knowledge which is to bind the principal must be of some matter so material to the transaction as to make it the duty of the agent to communicate it to the principal: *Fairfield Savings Bank v. Chase*, 72 Me. 226; 39 Am. Rep. 319. The notice or knowledge must also come from an authentic and reliable source, and be of such nature that a reasonably prudent man would act upon it; for neither the principal nor the agent is bound to take notice of or regard mere idle and baseless rumors or reports: *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361-368; *Kerns v. Swope*, 2 Watts, 75; *Milliken v. Graham*, 72 Pa. St. 484. Where an agent has power to employ a subagent, the act of the subagent, or notice given to him in the transaction of the business, has the same effect as if done or received by the principal; but if the agent has no authority to employ a subagent, notice to the latter is not notice to the principal: *Hoover v. Wise*, 91 U. S. 308-310; citing *Storrs v. City of Utica*, 17 N. Y. 104; *Lincoln v. Battle*, 6 Wend. 475; to the same effect, *Massachusetts etc. Ins. Co. v. Eschelman*, 30 Ohio St. 647-657. Notice to one who has been an agent, after the termination of the agency and the business involved therein, is not notice to the former principal: *Beardman v. Taylor*, 66 Ga. 638; *Housman v. Girard etc. Ass'n*, 81 Pa. St. 256-262. The rules and principles above stated apply with particular force to corporation cases, and a thorough discussion thereof will be found in the note appended to *Bank of Putney v. Whithead*, 36 Am. Dec. 186-200.

STEIN v. SWENSEN.

[43 MINNESOTA, 360.]

USURY, AGREEMENT FOR—EXTENSION—EVIDENCE OF CONTEMPORANEOUS ORAL AGREEMENT.—Where the defense of usury is set up to a loan on notes and extensions thereof, and a written agreement signed by the borrower, authorizing the general agent of the lender to negotiate the loan, and referring to extensions, is proved, evidence of an oral contemporaneous agreement made by the agent at the time of the loan, in respect to extensions of the notes upon payment of a commission, and evidently made as a means of avoiding the statute concerning usury, is admissible.

USURY—LOAN BY AGENT—EVIDENCE OF METHOD OF TRANSACTING BUSINESS.—When the defense of usury is set up in an action on a loan and extensions made by the lender through his general agent, evidence of the manner in which the agent transacted the business of his agency in loaning money, that he ordinarily used certain blanks, made loans for one month, and extensions for one month, and charged commissions of a percentage on the loans and extensions, nominally for his services rendered the borrower, but in fact to evade the statute against usury, is admissible.

USURY—LOANS BY AGENT—KNOWLEDGE AND LIABILITY OF PRINCIPAL.—Under a general agency to conduct the business of money-lending, the principal is presumed to know the agent's general mode of carrying it on; and if the agent conducts it usuriously, the principal is presumed to know it, and if he permits it, is responsible to the same extent as if he had authorized it in advance.

USURY—UNREASONABLE SUM AS COMPENSATION AS EVIDENCE OF USURY.—Where the lender of money, or his agent, and the borrower agree upon a sum for compensation to the former for services, for which he may charge the latter, it will not make the loan usurious, if agreed upon in good faith, even though it is unreasonable; the unreasonableness of the amount, however, in respect to the services, is evidence of greater or less weight, according as the amount is more or less unreasonable, that it was taken or stipulated for, in part at least, as compensation for the use of the money, and a mere cover to hide the usuriousness of the transaction.

EVIDENCE—TESTIMONY OF WITNESS AT FORMER TRIAL.—Where the deposition of a witness is taken and produced in a case, his testimony on a former trial cannot be proved on the ground of his absence from the state; nor will the failure of a witness to recollect the particular facts, short of mental imbecility, admit proof of his testimony at a former trial.

Selden Bacon, for the appellants.

S. Meyers, for the respondent.

GILFILLAN, C. J. This case was here once before on an appeal from an order denying a new trial after a verdict for defendants, and is reported in 44 Minn. 218. Reference is made to the opinion therein reported for a general statement of the case. After a second trial, ending in a verdict for the

plaintiff, this appeal is brought from an order denying defendants' motion for a new trial. The assignments of error are very numerous, but they may be referred to comparatively few propositions.

The loans were made in behalf of plaintiff, a non-resident of the state, by his agent, Henry Stein, doing business in Minneapolis, to Vaughn & Co., the assignors in insolvency of one of the defendants. The authority of Henry Stein to act in behalf of the plaintiff was shown by a letter of attorney, from which it appears that the former was vested with full power, without any restriction, to loan and collect money for plaintiff; in other words, to carry on the general business of a money-lender. Henry Stein was a general agent, in the sense that all his acts, within the general scope of his powers in that business, are presumed to be the acts of the plaintiff. The two loans in question were, respectively, for five hundred dollars and three hundred dollars, each for one month, the full interest which parties may stipulate being reserved in each note. There is no dispute that Vaughn & Co., at the times of making the loans, also paid the agent in the case of the first loan fifteen dollars, and of the second nine dollars; and also paid him similar sums on subsequent renewals or extensions, for thirty days at a time, of the notes. The defendants claim that the fifteen dollars and nine dollars so paid the agent, though paid nominally as compensation to him for services rendered by him for the borrower, such as he had a lawful right to charge for, were in truth paid as part of the consideration for the use of the money, and that the extensions were made pursuant to the original agreement for the loans, and as a means of evading the statute. The plaintiff, on the other hand, claims that the sums so paid to the agent were *bona fide* paid, solely as compensation for services rendered the borrower, and that at the times of making the loans there was no understanding that there should be extensions. These opposing claims present the main questions of fact.

On the trial the notes were introduced in evidence, and on each was indorsed with a rubber stamp the extensions of it. It does not appear that the agent did anything else in the matter of the extensions than to impress these indorsements on the notes, which could hardly be deemed a service rendered the borrower, any more than an agreement for the extensions (agreement for forbearance) could be regarded a service for

which a charge could be made. The defendants introduced an instrument, signed by the borrower, dated the same day as the first note, and in these terms: "Agent's authority to Henry Stein, money-broker, 324 Nicollet Avenue. I, H. C. Vaughn, hereby authorize and employ Henry Stein to negotiate a loan for me on chattel-mortgage security for the sum of five hundred dollars, for the period of one month from date hereof, with interest thereon at the rate of ten per cent per annum, and agree to pay him as compensation therefor fifteen dollars; and also agree to pay him — dollars for securing an extension for said loan for each and every month after maturity." On the examination of Vaughn, a witness for defendants, they asked him if there was an oral agreement, in addition to said instrument, for an extension or extensions of the notes upon payment of a commission, at the time of the original loan. As there is no device or shift on the part of the lender to evade the statute under or behind which the law will not look, in order to ascertain the real nature of the transaction; as no act however formal, no instrument however solemnly executed, will stand in the way of the court getting at the truth, in order to determine whether there has been an attempt to evade the law,—it was competent to prove the oral agreement indicated by the question. But the question was, as to its form, objectionable, as, instead of asking for the conversation, it called for the conclusion of the witness, and was also leading; and being objected to on those grounds, it was properly excluded.

The defendants asked the witness, and also the witness Henry Stein, on cross-examination, questions the answers to which might tend to show the manner in which Henry Stein transacted the business of his agency; that he ordinarily used blanks like the above instrument; that he ordinarily made loans for only one month, and extensions for only one month, and charged commissions of a percentage on the amount loaned upon each loan and each extension, nominally for his services rendered the borrower. This evidence was excluded. It would not have been competent to prove particular independent transactions with either Vaughn or any one else, for that might raise an indefinite number of issues, the character of each to be contested, the consequence of which would be to confuse the jury, and divert their minds from the issues before them for determination. But the general manner of doing business by the agent might be proved. The authority

being general to conduct the business, without any restrictions upon the agent in the manner of conducting it, the principal would be presumed to know the agent's general mode of carrying it on. If the agent conducted it usuriously, the principal would be presumed to know it; and if he permitted it, he would be responsible to the same extent as if he authorized it in advance. If the general manner of doing it was by the use of particular blanks, by making loans and extensions for only one month at a time, charging upon each loan and extension, in addition to the full legal rate of interest, a percentage on the loan, he would be presumed to know it. Certainly, if the business was conducted in that manner with his knowledge, it would have the same force as evidence upon a particular transaction in issue that his personal conduct of the business in that manner would have. In *Adamsen v. Wiggins*, 45 Minn. 448, a case where usury was charged, it was held that it was proper to show the manner in which the business was conducted by the agent under his general authority to invest and reinvest the plaintiff's money. It is true, as held in *Acheson v. Chase*, 28 Minn. 211, where an agent to loan moneys exacts from the borrower, for his own benefit, a sum in addition to the lawful interest, and the same is not authorized, sanctioned, nor ratified by the principal, it is not usury, so far as the principal is concerned; and it is equally true that if such exaction be authorized or sanctioned by the principal, it will be usury if it would be did he make such exaction personally: *Avery v. Creigh*, 85 Minn. 456. In that case, by agreement between the principal and agent to make loans, the latter was to receive no compensation from his principal, but was "to make what he could out of it." Of course, upon the question of usury, the written authority to the agent does not conclude the inquiry whether the principal authorized or sanctioned unlawful exactions. Whether the letter of attorney in this case authorized it or not, if the principal knowingly permitted the business to be carried on in the manner indicated by the questions excluded, such conduct of the business was as much the act of the principal as if he had so transacted it personally. Assuming that the evidence, had it been admitted, would have shown authority in the agent to make the loans in question in the manner in which they were made, was that manner any evidence of usury? We think it was. When what is taken, nominally as compensation for the agent's services, is

arrived at by a percentage upon the amount loaned, instead of by agreement or estimate as to the actual value of the services, we think that from that fact the jury may conclude that the loan is the consideration for the amount thus taken, and that the agreement that it shall be in compensation for services is only a cover. If the loan be in fact the consideration for the amount taken; if that amount be in part the consideration for the forbearance, and it be authorized or sanctioned by the principal; if the whole amount taken and reserved exceed the lawful rate,—it is usury, whether it is taken for the benefit of the principal or of the agent. If an unlawful rate is taken for forbearance, it does not matter to whom the excess goes: *Avery v. Creigh*, 85 Minn. 456. It was error to exclude the evidence thus offered.

Another matter involved in one of the points made by the appellants needs consideration. It is the proposition that where an amount agreed on as compensation for the agent's services for examining securities, drawing the papers, and the like, is unreasonable or exorbitant, that of itself will make the transaction usurious. There is language used in *Acheson v. Chase*, 28 Minn. 211, and *Avery v. Creigh*, 85 Minn. 456, that might lead to the conclusion that such is the view of this court. But as usury consists in taking or contracting for a greater rate than the law permits for forbearance of money, it must be apparent that if the taking or contracting be for something else than forbearance,—than for the use of the money,—it is not usury. To hold that if the lender and borrower agree upon a sum for compensation to the former for services for which he may charge the latter, it will make the loan usurious, if a jury shall determine that the amount thus agreed on is unreasonable, would go far to disable the parties from making any contract on the subject. They are at as full liberty to make a contract on that subject as any other, provided they do so *bona fide*, and without intent to evade the law. But as that sort of agreement is often resorted to to cover a usurious charge, and as the court will in such a case look beyond the apparent agreement of the parties to get at the actual intention, and as in such cases the amount so taken can be referable only to the use of the money or to compensation for services, unreasonableness of the amount in respect to the services is evidence of greater or less weight, according as the amount is more or less unreasonable, that such amount was taken or stipulated for as—in

part at least — compensation for the use of the money. And as was the case in *Avery v. Creigh*, 35 Minn. 456, the amount taken may be so exorbitant in respect to services for which the lender may charge the borrower as to force the conclusion that it was taken for the use of the money. Unreasonableness is not of itself usury, but is only evidence of it.

There are some minor questions which we can see may arise upon another trial, and will therefore dispose of. The defendants, having taken by deposition the testimony of Henry Vaughn, and the deposition being in court, are not in position to prove what he swore to on a former trial, on the ground of his being out of the state, even though that be a ground for it in any case. We do not think his failure to recollect the particular facts justifies proving his former testimony. When failure of memory amounts to mental imbecility, the witness is as one dead or insane, and as his testimony cannot then be taken, his testimony upon a former trial of the same issues, between the same parties, may be resorted to. To admit it in any less case would continually present the question, What degree of forgetfulness shall be required?

Where the question is, What was the agreement between two parties? neither can ordinarily testify what he understood it to be, but he must testify what was said and done. Henry Stein was shown competent to testify to the value of his services.

Order reversed.

USURY — BONUS PAID TO AGENT. — As to when bonus paid to agents negotiating loans will be deemed usurious, see note to *Davis v. Garr*, 55 Am. Dec. 395, 396; *Condit v. Baldwin*, 21 N. Y. 219; 78 Am. Dec. 137, and note; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69, and extended note 70-75; *Fahberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 72. Whether a charge of commissions for negotiating a loan, in addition to the full legal rate of interest, will be considered usury depends upon the fact whether the person exacting them was or was not the agent of the lender: *Telford v. Garrels*, 122 Ill. 550. If the borrower employs the agent and pays him a commission, the lender cannot be charged with usury: *Hughes v. Griswold*, 82 Ga. 299; *Lane v. Washington L. Ins. Co.*, 46 N. J. Eq. 316. Where one agreed to pay another a certain "brokerage" to negotiate a loan for him, and also to pay an attorney's fee for making an abstract of title, such sums, not being for loan or forbearance of money, do not constitute usury, although the amount exceeds legal interest: *Keagy v. Trout*, 85 Va. 390. In *Tepool v. Saunders Co. Nat. Bank*, 24 Neb. 815, where a party negotiated a loan for another of \$1,000 for five years, at eight per cent, and took notes, as a bonus, for \$350, without interest, due in less than one year, it was held that the interest of five years would not be added to the notes taken for a bonus, in order to taint the transaction with usury. In *Lewis v. Willoughby*, 43 Minn.

307, where an agent, who had the entire control of his principal's business of negotiating loans, exacted for his principal a bonus in excess of lawful interest, it was decided that the usurious act was the act of the principal; and to the same effect is *Adamsen v. Wiggins*, 45 Minn. 448.

EVIDENCE — CONTEMPORANEOUS ORAL AGREEMENTS. — The general rule is, that contemporaneous oral agreements are inadmissible to vary or contradict a written contract, in the absence of fraud or mistake: Note to *Appel of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 893, 894; note to *Sullivan v. Lear*, 11 Am. St. Rep. 894. But parol evidence to prove usury is always admissible: *Edrington v. Harper*, 3 J. J. Marsh. 353; 20 Am. Dec. 145.

WITNESSES — TESTIMONY GIVEN AT A FORMER TRIAL. — As to the conditions and restrictions surrounding the admissibility of the testimony of a witness given at a former trial, see note to *Bergen v. People*, 65 Am. Dec. 677, 678; note to *Magill v. Kaufman*, 8 Am. Dec. 717.

PAYNE v. PAYNE.

[40 MINNESOTA, 457.]

DIVORCE — IMPOTENCY means, in the law of divorce, incurable incapacity, admitting neither of copulation nor procreation.

DIVORCE — SUFFICIENT FINDING OF IMPOTENCY. — A finding in an action for divorce that one of the parties is "impotent" is a complete and sufficient finding upon the issue of impotency, and implies and includes every element essential as a ground for divorce.

ACTION for divorce, on the ground of the impotency of the wife.

Ferguson and Kneeland, and Edward O. Gale, for the appellant.

E. A. Sumner, for the respondent.

MITCHELL, J. The statute does not define the term "impotency," but in the law of divorce it means want of *potentia copulandi*, and not merely incapacity for procreation. It is an incapacity that admits neither copulation nor procreation. And what the law refers to is capacity for *copula vera*, and not partial and imperfect or unnatural copulation. The incapacity must also be incurable: 1 Bishop on Marriage and Divorce, secs. 765 et seq.; *D——e v. A——g*, 1 Rob. Ecc. 279. The nature of the case forbids a discussion of the evidence, but in our opinion it fully justified a finding that the defendant was "impotent," in the legal sense of the term. The court finds that she "was at the time of her marriage, and every since has been, and is still, impotent." This is a complete and sufficient finding upon the only issue in the case;

for the word "impotent" implies and includes every element essential as a ground of divorce. The learned judge, however, instead of limiting his findings to this one ultimate issuable fact, has, in accordance with an unfortunately common practice, incorporated into them a statement of the evidence and his conclusions on numerous mere evidentiary facts, in which, after describing defendant's natural defects, the efforts by surgical operations to remedy these defects, and the failure of such efforts, he adds: "We are unable to find that the defendant's condition could be materially bettered by further surgical operations. She appears to have consulted noted surgeons, and was for a long time treated by Dr. Phillips, and after continued operations we find her in the condition above stated at the time of her marriage." It is contended that this amounts to an express special finding that he was unable to decide whether defendant's impotency was curable or not. We do not think that it fairly admits of this construction. What we think the judge meant was, that in view of the serious character of defendant's natural deformity, and the failure of previous skilled operations to remedy it, he was of opinion that any future operations would be equally unsuccessful; which was but a mild way of saying that the defect was incurable.

Order affirmed.

MARRIAGE AND DIVORCE — IMPOTENCY AS A GROUND FOR DIVORCE — This subject is discussed in *Anonymous*, 89 Ala. 291; 18 Am. St. Rep. 116; *Devanbagh v. Devanbagh*, 5 Paige, 554; 28 Am. Dec. 443, and extended note.

WISTAR v. FOSTER.

[46 MINNESOTA, 434.]

MARRIED WOMEN — DEEDS OF, MAY BE LEGALIZED. — The deed of a married woman, executed in good faith, without the concurrence of her husband, may be legalized by statute; and the inchoate right of the husband in land so conveyed may be taken away in like manner.

CONSTITUTIONAL LAW — STATUTE LEGALIZING DEEDS OF DIVORCED MARRIED WOMEN. — A statute, retrospective as well as prospective in its operation, legalizing the sole deeds of married women, executed in good faith after judgment of divorce in certain cases, although defective service of process may have rendered the judgment invalid in fact for want of jurisdiction, is valid and constitutional, and such deed, executed in a case provided for by the statute, conveys a good title.

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Spencer and Washburn, for the appellant.

Cash and Williams, and W. W. Billson, for the respondents.

VANDEBURGH, J. This action is brought by the plaintiffs, claiming to be the owners of the land described in the complaint, to determine the adverse claim of the defendants. The defendants' answer shows that they were married in 1842, and are still husband and wife, and that on the twenty-fourth day of November, 1885, the defendant Hannah C. Foster was the owner in fee of the land, and on that day she executed a deed thereof to the plaintiff, Wistar, but that the defendant Thomas Foster did not join therein, and has not executed any instrument conveying or releasing such lands. These facts are found by the court, but it also appears that a judgment of divorce, regular in form, was granted and duly entered in favor of the defendant Hannah against the defendant Thomas, in the district court of St. Louis County, on the thirtieth day of May, 1877. Mrs. Foster, the plaintiff in the action, was a resident of St. Louis County at that time, and for a long time previous thereto; but her husband, Thomas Foster, was a non-resident, and the service of the summons was attempted to be made upon him by publication, but in consequence of irregularities in the proceedings, no valid legal service of the same was made. He, however, had notice of the proceedings, and received a copy of the complaint in season to appear and answer, if he so desired. On the contrary, he informally notified the court that he was willing that the divorce should be granted. No appeal was taken from the judgment, and no attempt made to set it aside, but the same is void for want of jurisdiction, for the reason stated. Mrs. Foster afterwards sold and conveyed the land, as above stated, for the sum of six thousand dollars, the consideration of the deed referred to, which sum she actually received. The court also finds that in making the purchase of the lands of the defendant Hannah C. Foster the plaintiffs acted in good faith, in the belief that by reason of the divorce proceedings she had the legal right to make such conveyance. The purchase was made by Wistar in behalf of all the plaintiffs, and he thereafter conveyed to his co-plaintiffs undivided interests in the premises.

Conceding the deed to have been invalid on account of the legal incapacity of Mrs. Foster to make the same unless her husband should join therein, the case turns upon the question whether it was legalized and established by the Laws of 1889,

§ 108. This chapter is an amendment to the General Statutes of 1878, c. 69, sec. 2, in relation to contracts of married women, and provides "that any deed, mortgage, or other conveyance of land in this state, heretofore or hereafter made in good faith for a valuable consideration, by an adult woman, without any husband having joined therein, but after judgment of any district court of this state, remaining in full force, adjudging the nullity of her marriage, or granting her a divorce from bonds of matrimony or from bed and board, shall be as valid and effectual, to all intents and purposes, as if she had never been married, any defect in the service of the summons or complaint in the action for such relief or divorce to the contrary notwithstanding; provided, nevertheless, such deed, mortgage, or other conveyance was made after expiration of the time allowed by law to appeal from such judgment; and provided further, that the defendant in such divorce proceedings actually received the summons and complaint, or had, before entry of such judgment, actual knowledge of the pendency of such action, so that he could have defended the same, which shall appear by the records in the case, or be made to appear to the satisfaction of the court."

It is clear that the legislature might, in the first instance, have clothed married women with the power to convey their separate real estate without any conditions or restrictions, as if unmarried; and where there is no constitutional provision prohibiting retrospective legislation, it is a well-settled rule that whatever the legislature might have dispensed with in advance it may dispense with retrospectively, by enacting that its omission shall not prejudice: *Sinclair v. Learned*, 51 Mich. 835, 845, and cases. And in regard to contracts defectively executed, the healing act merely gives effect to the intention of the parties, and enforces an equity, by simply taking away the right of the party to avoid his contract, — a naked legal right, which the legislature may take away: *Cooley's Constitutional Limitations*, 446. "The benefit which he received as the consideration of the contract which, contrary to law, he has actually made is just ground for imposing upon him by subsequent legislation the obligation or liability he intended to incur": *Ewell v. Daggs*, 108 U. S. 143, 151. It is not like an attempt by legislative enactment to validate a judgment void for want of jurisdiction; for the legislature could not authorize such a judgment, and the procedure would be without due process of law. Nor does it impair the obliga-

tion of the contract; for a contract invalid, or for the enforcement of which the law affords no remedy, cannot be said to be impaired by validating it, or affording a remedy for its enforcement: *Gross v. United States Mortgage Co.*, 108 U. S. 477, 488. The deed of a married woman, executed without the concurrence of her husband, may therefore be legalized; and the inchoate right of the husband in lands so conveyed by her may also be taken away by act of the legislature. This proposition we understand to be conceded by the defendant, and is supported by the decision in *Morrison v. Rice*, 35 Minn. 436. So that if the deed in question here falls within the provisions of the statute above quoted, it is to all intents and purposes as valid and effectual as if the grantor, Mrs. Foster, had never been married, and hence free and clear of any contingent right, claim, or interest of her husband. The statute we are considering was undoubtedly passed to legalize transactions of the character in question here, and to protect parties purchasing the separate property of married women on the faith of the validity of a judgment of divorce, invalid in fact for want of jurisdiction. Where a court, upon inspection of the record of the proceedings, has ordered judgment, which has been entered in due form, it is not surprising that laymen should honestly and in good faith be misled, and accept as valid what parties in interest have not questioned, especially after considerable lapse of time.

The facts found clearly bring the case within the provisions of the statute. The transaction has all the indicia of good faith, and the purchase is found to have been entered into in good faith, and was for a valuable consideration paid. Parties may act in good faith, under an honest mistake of their strict legal rights to property, notwithstanding the records may disclose defects which impair them. The doctrine of constructive notice is not applicable to this class of cases. The statute is based upon the assumption that there may be such mistakes; and in some cases they form the basis for equitable relief: *Gerdine v. Menage*, 41 Minn. 417, and cases. The terms "good faith," in this act, are evidently used in their ordinary and popular sense, referring to the actual knowledge and intentions of the parties: *Woodward v. Blanchard*, 16 Ill. 424, 430; *McConnel v. Street*, 17 Ill. 253; *Winters v. Haines*, 84 Ill. 585; *Mitchell v. Campbell*, 19 Or. 198; *Hawkins v. Brown*, 80 Ky. 186; *Sanders v. McAfee*, 42 Ga. 250; *Thornton v. Bledsoe*, 46 Ala. 73; *Morgan v. Hazlehurst Lodge*,

53 Miss. 665, 683; *Union Dime Savings Institution v. Duryea*, 67 N. Y. 84, 87. The language of the statute, "after judgment of any district court in this state, remaining in full force," must be construed in connection with the words which follow, "any defect in the service of the summons or complaint in the action for such divorce to the contrary notwithstanding." That is to say, it refers to judgments that have remained undisturbed, notwithstanding such defects, till after the time for appeal has gone by, and applies not merely to judgments which are irregular, but to those which are void. A party to a judgment void for want of jurisdiction may have it set aside on motion, or reversed on appeal; and the statute undoubtedly has special reference to such judgments, because if the defects do not affect the validity of the judgment, and the same is suffered to stand, deeds subsequently executed by the parties would not require aid of the statute to support their validity. If the legislature may validate the sole deeds of married women generally, as between the parties, and cut off the inchoate rights of their husbands in their separate property, we are unable to see why such enactments may not, in like manner, be made applicable to a particular class, where the facts present special equitable grounds for such interference. We think the statute is valid, and is applicable to this case.

Judgment affirmed.

STATUTES—HUSBAND AND WIFE—POWER OF LEGISLATURE TO VALIDATE VOID INSTRUMENTS.—The legislature has power to validate imperfect instruments: *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802. The legislature may pass laws of a retrospective nature which merely take away a right of action, or only divest rights vested by law in an individual, if it does not divest vested rights in property, nor impair the obligation of a contract: *Drehman v. Stifel*, 41 Mo. 184; 97 Am. Dec. 268. A deed for land owned by a married woman, executed by herself and husband, the certificate of acknowledgment being defective, as not showing a separate examination of the wife, was rendered valid by a statute: *Shroeder v. Snyder*, 142 Pa. St. 1.

WARDWELL v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

[46 MINNESOTA, 514.]

CARRIERS OF PASSENGERS — EXPULSION OF PASSENGER — NON-PAYMENT OF FARE. — Where a passenger without a ticket, after opportunity to procure one, boards a passenger train to ride from one station to another, upon being informed of the train fare pays it to the conductor, who, before the train arrives at the first station from the starting-point, informs the passenger that he has made an error in the amount of fare, requesting enough additional to make the full fare, which the passenger refuses to pay, he may be expelled from the train at the first station from the starting-point, after a return of the money paid by him, less the fare between the stations; but the return of the money is a condition precedent to the right of expulsion; and if the passenger is expelled before it is returned, his cause of action is complete, and cannot be impaired by the subsequent, though immediate, tender of the amount remaining due to him.

CARRIERS OF PASSENGERS — NON-WAIVER OF TRAIN FARE. — Although a train conductor may have authority to accept for the fare of a passenger without a ticket less than full fare, and thereby waive the company's right to full train fare, the receipt by the conductor, through mistake, for the full fare, of less than that fare will not constitute a waiver. He has a right, upon discovering the mistake, to require the passenger, within a reasonable time, on informing him of the error, to pay the full train fare; and upon his refusal, may retain the money paid until the next station is reached, where he may eject the passenger, after returning the money paid, less the fare between the starting-point and the point of expulsion.

CARRIERS OF PASSENGERS — EXPULSION OF PASSENGER FOR NON-PAYMENT OF FARE. — Where one without a ticket voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has the right to expel him before reaching his destination, a request must be implied to be carried to the place where the company may rightfully expel him, which is the next regular station, and there he may be put off the train.

F. W. Root and W. H. Norris, for the appellant.

Amos Coggsrwall, and Sawyer and Sawyer, for the respondent.

GILFILLAN, C. J. The plaintiff, without procuring a ticket, though he had full opportunity to do so, boarded a passenger train of defendant at Faribault to go to Owatonna. The ticket fare was forty-six, the train fare fifty-six, cents. Soon after the train started, the fare collector came to plaintiff and asked him where he was going, and on being told to Owatonna, said the fare was fifty cents, which plaintiff then paid him. A few minutes after, and before the train reached Walcott, the first station from Faribault, the collector came again

to plaintiff, and told him he had made an error in the amount of the fare, and insisted that he should pay the other six cents, and on plaintiff refusing, told him unless he paid it he would put him off the train. Plaintiff still refused, and on the arrival of the train at Walcott, plaintiff persisting in his refusal, the collector put him off, and after he was off, returned to him the difference between the fifty cents and the fare from Faribault to Walcott.

Assuming (what, in view of the defendant's regulations posted up in its passenger stations and passenger-cars, can hardly be assumed) that the collector had authority to accept for the fare any less than the fifty-six cents, and waive the company's right to full train fare, the receipt by the collector, through mistake, for the full fare, of less than the fare, did not amount to such waiver. The collector had a right, on discovering the mistake, to require the plaintiff, certainly within a reasonable time, on informing him of the error, to pay the remainder of the train fare, just as any one, on discovering a mistake in payment, may, within a reasonable time, require its correction. And it was the duty of the plaintiff, on being informed of the error, to pay the remainder of the full train fare, as demanded by the collector. Nor was the collector's retention of the money paid him by plaintiff (still assuming his authority to waive any part of the train fare) until the arrival of the train at Walcott, and while the question whether the plaintiff would pay the remaining six cents or leave the train was an open one (for, notwithstanding his previous refusal, the plaintiff might, until the arrival at Walcott, where the train was to stop without regard to his matter, still pay and secure the right to go to his intended destination), such a waiver, and especially as the collector insisted on payment of full train fare, and informed plaintiff that he must pay or leave the train. The rule laid down in *Du Lurans v. First Division etc. R. R. Co.*, 15 Minn. 29 (49) 2 Am. Rep. 102, to the effect that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, is (assuming the conductor's authority to waive it) undoubtedly correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full

for his fare to the place of his destination. Thus if the conductor should receive and retain it, without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But it cannot correctly be applied to a case like this. It would be equivalent to the proposition that the collector waived payment while insisting upon it, — a proposition contradicting itself.

To determine whether he would pay the difference demanded, or persist in his refusal and leave the train, the plaintiff had until the train stopped at a place where he might be put off. So long as he had that election, the collector might retain the amount paid him to abide it. As soon as it was made, to wit, when plaintiff finally refused at Walcott, the right of the collector to retain the entire sum paid ceased, except he chose to retain it for the very purpose for which it was paid him; that is, for the full fare to Owatonna. He could not retain the entire sum, and also eject the plaintiff. As precedent to the right to expel him from the train, he should have returned to plaintiff what he was entitled to of the money, and until he did that, he had no right to put him off. It is true, he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion. We have said the collector ought to have returned to him what he was entitled to of the money (not the whole of the money), because we hold that where a passenger refuses to pay the fare rightfully demanded of him to his place of intended destination, and the carrier puts him off at a proper place because of such refusal, the carrier has a right to be paid the proper fare for carrying him to that place, and to retain it out of any money the passenger may have paid on account of fare. This is contrary to what was decided (the court being divided upon it) in the *Du Laurans* case. The reasons given for the decision in that case were, that the passenger does not intend to make a contract to be carried to the place, short of his intended destination, where he is put off, and that the carrying the passenger in that case to the place where he was put off was no benefit, but on the contrary a detriment, to him. When, under circumstances that imply a request, a railroad company carries a passenger from one point to

another, it is no concern of the company, as affecting its right to compensation, that it is or is not to the advantage of the passenger to be carried to and left at the latter place, and it is therefore immaterial. The sole question is, Was the service rendered at the request, express or implied, of the passenger? When one voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has a right to put him off before reaching that place, a request must be implied to be carried to the place where the company may rightfully put him off. His intention must be taken to be to ride to the destination expressed by him, if the company will carry him to that place without his paying the fare, and if it will not, then to ride to such place where the company may rightfully put him and does put him off. That in such case he may be carried to and left at such place is what he must be presumed to expect and intend. And he can have no right to expect that the company will put him off till the train reaches its first regular stopping station. The train need not stop for the mere purpose of putting him off.

The facts upon which we hold that the expulsion of the plaintiff from the train was wrongful were established at the trial, and not disputed, so that he was entitled to a verdict. The instructions of the court assigned as error, going only to the right to a verdict, were therefore, if erroneous, harmless. We see no error in the instructions touching the measure of damages.

Order affirmed.

RAILROAD COMPANIES — CARRIERS — EXPULSION OF PASSENGERS FOR NON-PAYMENT OF FARE. — A railroad company may eject a passenger for refusal to pay fare: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780, and note; note to *Commonwealth v. Power*, 41 Am. Dec. 473-478, discussing the rule requiring a passenger to purchase a ticket and exhibit it to the conductor, and the right of the conductor to eject a passenger who does not show a ticket nor pay fare. A railroad company has no right as a carrier of passengers to expel a passenger for non-payment of full fare without first returning the fare paid: *Bland v. Southern Pac. R. R. Co.*, 55 Cal. 570; 35 Am. Rep. 50; note to *Toledo etc. R'y Co. v. Wright*, 34 Am. Rep. 284, 285.

WARDER, BUSHNELL, AND GLESSNER COMPANY v. WILLYARD.

[46 MINNESOTA, 581.]

PRACTICE — UNAUTHORIZED PLEADING AS ADMISSION OF FACT. — The contents of an unauthorized pleading filed in a justice's court may be treated on appeal as in the nature of formal admissions made by the party filing it.

FRAUDULENT ALTERATION OF EVIDENCE OF DEBT AS EXTINGUISHMENT THEREOF. — The holder of written security or evidence of debt, who has altered or changed the instrument in a material part to his own advantage, with intent to defraud his debtor, cannot recover thereon. Such alteration extinguishes the debt.

ALTERATION OF EVIDENCE OF DEBT — PRESUMPTION OF FRAUD — BURDEN OF PROOF. — Where the holder of written security or evidence of debt alters or changes the instrument in a material part to his own advantage, and then brings suit on the original indebtedness, the alteration is presumptively fraudulent, and the burden of proof is on him to show that it was innocently made and does not act as an extinguishment of the debt.

P. E. Brown, for the appellant.

E. H. Canfield and A. J. Daley, for the respondent.

COLLINS, J. This was an action originally brought in justice's court, to recover the sum of forty dollars, alleged to have become due on November 1, 1889, as an installment of the agreed price of a harvesting-machine sold and delivered by plaintiffs to defendant. The latter, by his answer, admitted the sale and delivery, but averred that, in accordance with the terms therewith, he executed and delivered to the plaintiffs his three negotiable promissory notes, each payable to their order, aggregating in amount the stipulated price of the machine; one of the same being for forty dollars, maturing November 1, 1889, and having been given for the identical installment to recover which the action had been instituted. He further alleged that after the making and delivery of said note, the plaintiffs, without the knowledge or consent of defendant, willfully and fraudulently altered the note by changing the amount of the same from forty dollars to forty-five dollars. On those pleadings the parties proceeded to trial, although the plaintiffs made and filed a so-called reply, in which the execution, delivery, and alteration of the note for forty dollars were admitted. It was further averred therein that the alteration was not willful or fraudulent, and that it was made without plaintiffs' knowledge or consent. The

plaintiffs had a judgment, from which an appeal on questions of law alone was taken to the district court, all of the proceedings and the evidence being returned. The appeal here is from a judgment in plaintiff's favor in the last-named tribunal.

1. The paper styled a "reply" was unauthorized as a pleading in the case, and, as such, must be treated as a nullity. The statute (Gen. Stats. 1878, c. 65, sec. 28) authorizes a reply in justice's court only when a counterclaim is set up in the answer. But it was filed by the plaintiffs without objection from the defendant, and beyond a doubt was considered by the parties and the justice as properly in the case. In the district court it was not regarded as a reply, but its contents were treated as in the nature of formal admissions made by the plaintiffs upon the trial, and this view of the effect of the paper was not erroneous.

2. As the plaintiffs could not maintain an action upon the materially altered promissory note, they were compelled to resort to the original consideration as a foundation for their claim; and the question then arose, and is now presented, of their right to recover on the indebtedness for which the note was given. From an examination of the authorities, it appears to be well settled that a recovery is not permitted, in any form of action, where the holder of a written security or evidence of a debt has altered or changed the instrument in a material part, to his own advantage and with intent to defraud his debtor. The law is stated to be, that when the holder of a bill or note fraudulently alters its legal effect, he not only destroys the instrument by thus destroying its legal identity, but he also extinguishes the debt for which it was executed and delivered: Daniel on Negotiable Instruments, sec. 1410 a; Randolph on Commercial Paper, sec. 1763; Chalmers's Digest of Bills and Notes, art. 249; Chitty on Bills and Notes, 100 q; and cases cited in each of these volumes. We find but one well-considered and fairly recent case to the contrary: *Matteson v. Ellsworth* (1873), 33 Wis. 488; 14 Am. Rep. 766. It is said that the policy of the rule which forbids a recovery upon an instrument which has been fraudulently and materially altered is to prevent the perpetration of fraud; and it is very obvious that if the guilty party may thereafter recover as on the original debt, the rule itself would be defeated. If a party can be allowed to take the chances of success by fraudulently altering the written obligation of

a debtor, without risk of loss in case of discovery, frauds of this description would be greatly encouraged. The law has therefore imposed upon a party who fraudulently tampers with an instrument given to evidence or to secure an indebtedness, in any material particular, the forfeiture and absolute loss of the debt itself, upon the principle that "no man should be permitted to take the chances of gain by the commission of a fraud, without running the risk of loss in case of detection." Indeed, it has been held that when the alteration was a material one, not only was the instrument avoided, but the original consideration forfeited, without inquiry as to the intent: *Daniel on Negotiable Instruments*, sec. 1411, and cases cited.

3. It stood admitted by plaintiffs, by means of the paper filed by them styled the "reply," that the note had been materially changed and altered after its execution and delivery. The defendant testified fully as to the alteration, so that the fact was conclusively established upon the trial, and the court could not have found to the contrary. This brings us to a consideration as to where the burden of proof was on the question of the character and intent of the alteration. The plaintiffs asserted, in connection with their admissions, that the change was not willful or fraudulent, and that it was made without their knowledge or consent, but they gave no testimony and offered no explanation upon this feature of the case. We are very clearly of the opinion that if the alteration of the instrument be a material one, it is presumed to have been fraudulently made, and it is incumbent upon the holder to explain it. The act is apparently fraudulent. It is wrongful, and naturally indicates a wrongful intent, which requires an explanation to excuse it. The holder of a note or bill which has been altered in a material part must be required to show that the change was made innocently, or for a proper purpose, or by a stranger, or it would follow that when the most glaring forgeries have been committed by alterations of negotiable instruments, the maker or the party sought to be charged would have to discover the fraudulent motive of the forger, and establish it by proof. The party in default, and who ordinarily must have knowledge of all the circumstances attending the alteration, must bear the burden of explaining it, and of extricating himself: *Daniel on Negotiable Instruments*, secs. 1412, 1413, and *Randolph on Commercial Paper*, sec. 1785, with cases cited; *Milbery v. Storer*, 75 Me. 69;

46 Am. Rep. 361; *Croswell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238; *Robinson v. Reed*, 46 Iowa, 219.

After the instrument in question passed from defendant's hands into plaintiffs' actual or constructive possession, a material alteration was made by increasing the amount thereof. Admitting all this, and at the same time asserting that the change was not willful or fraudulent, and was without their knowledge or consent, the plaintiffs made no effort to explain the circumstances, or to show the facts, of which they must have been cognizant. The alteration itself was *prima facie* evidence of a fraudulent intent, and the *onus* then rested upon the plaintiffs to repel and overthrow this proof of such intent. It has already been held by this court that the unauthorized and material alteration of a mortgage by the mortgagee or with his privity, after execution, unexplained, is presumptively fraudulent, and vitiates the instrument: *Russell v. Reed*, 36 Minn. 376.

Judgment reversed.

ALTERATION OF INSTRUMENTS — EFFECT OF. — The fraudulent and material alteration of a chattel mortgage by an agent of the mortgagee avoids the mortgage and prevents foreclosure: *Hollingsworth v. Holbrook*, 89 Iowa, 151; 20 Am. St. Rep. 411. The alteration of an instrument in a material way avoids the paper as to the maker, even in the hands of *bona fide* purchasers: *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and extended note; *Montgomery v. Onestewart*, 90 Ala. 558.

ALTERATION OF INSTRUMENTS — BURDEN OF PROOF. — The burden of explaining material alterations is upon the holder of an instrument so altered: *Estate of Nagle*, 134 Pa. St. 31; 19 Am. St. Rep. 669, and note. See also note to *Harris v. Bank of Jacksonville*, 1 Am. St. Rep. 211. Every alteration on the face of a written instrument detracts from its credit and makes it suspicious, and this suspicion the party claiming under it is bound to remove: *Slater v. Moore*, 86 Va. 26.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

ROBINSON v. LEWIS.

[68 MISSISSIPPI, 69.]

**HUSBAND OF TENANT IN COMMON CANNOT PURCHASE INTEREST OF HIS
CO-TENANT AT TAX SALE.**

BILL to confirm a tax title to an undivided half-interest in certain land, acquired by the appellee, Lewis, at a sale for taxes. At the time of the sale his wife owned the other interest. She and her brother were tenants in common of the land. Prior to the tax sale, Robinson, the appellant, purchased the brother's interest at an execution sale. The court made a decree confirming the tax title, and Robinson appealed.

E. E. Baldwin, for the appellant.

D. S. Fearing, for the appellee.

COOPER, J. The decree of the court below must be reversed because of the incapacity of the complainant to purchase at a sale for taxes the interest of the co-tenant of his wife in the land. One co-tenant may not thus defeat the title of another to the common estate: *Harrison v. Harrison*, 56 Miss. 174; *Fox v. Coon*, 64 Miss. 465. The spouse of the co-tenant is equally disqualified: *Freeman on Cotenancy*, sec. 160; *Lee v. Fox*, 6 Dana, 172; *Burns v. Byrne*, 45 Iowa, 285; *Rothwell v. Dewees*, 2 Black, 613; *Busch v. Huston*, 75 Ill. 343. In *Cameron v. Lewis*, 59 Miss. 134, and *Carter v. Bustamante*, 59 Miss. 559, this court repudiated what had been said in *Hardeman v. Cowen*, 10 Smedes & M. 486, and *Taylor v. Eck-*

ford, 11 Smedes & M. 21, to the effect that the wife was in privity of estate with the husband, and that a purchase by her of a paramount title inured by operation of law to the benefit of a prior grantee of the husband. But it was distinctly said in *Cameron v. Lewis*, 59 Miss. 134, that an estoppel *in pais*, operative against the husband, would be applied against the wife. In *Carter v. Bustamante*, 59 Miss. 559, the land had been struck off to the state, and after the title had been absolute by the lapse of the period of redemption, a purchase was made by the wife of the former owner. In an action of ejectment (involving, of course, only the legal title), brought against the wife by one who claimed as purchaser under an encumbrance by the husband, we held that the title conveyed by the state to the wife did not inure by operation of law to the plaintiff in ejectment, and therefore that he had no legal title to the land, and because he did not, could not recover in ejectment. If the rule which prevents one spouse from securing a title where the other is disqualified rested only upon a supposed privity of estate between them, it might well be argued that our statutes upon the subject have destroyed its foundation. But the rule is founded upon considerations of public policy, and conclusively imputes to the one, as derived from the other, knowledge of those facts the existence of which precludes the other from action. The opportunities that would be afforded for fraudulent practices would be so numerous, and the difficulty of exposing them so great, that courts apply the doctrine of estoppel to both, and thus close the door that offers the temptation.

The decree is reversed.

CO-TENANCY — RIGHT OF ONE CO-TENANT TO PURCHASE THE INTEREST OF ANOTHER AT TAX SALE. — A tax title bought by one tenant in common of land cannot be set up against his co-tenant: *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586, and note; *Fallon v. Chidester*, 46 Iowa, 588; 26 Am. Rep. 164; *Weare v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616. A purchase by a tenant in common of an outstanding tax title inures to the benefit of all his co-tenants: *Lloyd v. Lynch*, 26 Pa. St. 419; 70 Am. Dec. 137, and note; *Clark v. Lindsey*, 47 Ohio St. 437; *English v. Powell*, 119 Ind. 93; *Donnor v. Quartermas*, 90 Ala. 164.

RAGSDALE v. RAGSDALE.

[68 MISSISSIPPI, 92.]

INTERCEPTION BY DEVISEE OF BOUNTY INTENDED FOR ANOTHER IS FRAUD FROM WHICH TRUST ARISES WHEN. — Where a devisee in a will is active in preventing the testator from making an intended provision therein for another, for whom provision would have been made but for his intervention, such devisee will be held to be a trustee of any devise to himself to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Such interception and diversion of the testator's bounty amount to fraud, from which a trust arises by operation of law.

BILL filed by E. E. Ragsdale against L. A. Ragsdale, seeking to hold the latter a trustee for the former as to a half-interest in certain real property. The defendant appealed from a decree overruling a demurrer to the bill. The other facts appear from the opinion.

Walker and Hall, and McIntosh, Williams, and Russell, for the appellant.

J. S. Hamm, and Fewell and Brahan, for the appellee.

CAMPBELL, J. There is no dissent in the books from the proposition that one who is active in preventing a testator from making an intended provision by his will for another, and where, but for such intervention, the intended provision would have been made, will be held to be a trustee of any devise to himself, to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Intercepting a bounty intended for another, and diverting it to one's self, is held to be a fraud, from which a trust arises by operation of law, and not within the statute of frauds or wills, but expressly excepted.

The facts stated in the bill show that the testator, who had procured a codicil to be prepared to change the devise made wholly to the appellant, so as to include the appellee as a sharer of the devise, was induced by representations and assurances of the appellant to forego and abandon his purpose to execute the codicil to effect the purposed change in the will, which was left as written because of such representations and assurances. Out of this transaction a trust arises by operation of law, because the testator was influenced with respect to his will, and an intended beneficiary was prevented from receiving the benefit which but for the intervention

stated would have been secured to him by the act of the testator.

We would not be understood as sanctioning the doctrine that an enforceable trust will arise from the mere breach of an oral promise, however solemn, to hold land in trust. There must be conduct influential in producing the result, and but for which such result would not have occurred, amounting, in the view of a court of equity, to fraud, to save the case from the statute of frauds. A merely oral promise and its subsequent breach, however disappointing and harmful, and though ever so reprehensible in morals, is not of itself enough to cause a court of chancery to declare a trust.

Affirmed, and thirty days given for answer after mandate filed in the court below.

TRUST ARISING BY OPERATION OF LAW. — Where an heir or a devisee in a will prevents the testator from providing for one for whom he intended to provide, and for whom he would have provided but for the interference of the heir or devisee, such heir or devisee will be deemed a trustee by operation of the law of the property received by him from the testator's estate to the amount that the defrauded party would have received had the testator's intentions not been interfered with: Note to *Thompson v. White*, 1 Am. Dec. 258; *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52, and note 60, 61; *Curdy v. Berton*, 79 Cal. 420; 12 Am. St. Rep. 157, and note; *Gilpatrick v. Glidden*, 81 Me. 137; 10 Am. St. Rep. 245; *Piper v. Heard*, 107 N. Y. 73; 1 Am. St. Rep. 789.

STINSON & Co. v. LEE.

[63 MISSISSIPPI, 112.]

INDORSER NOT LIABLE ON HIS INDORSEMENT BY VIRTUE OF PRESENTMENT TO ONE NOT NAMED IN INSTRUMENT. — Where the maker of a promissory note adds to his signature thereto the word "agent," the indorser cannot be made liable on his indorsement thereof without proof of presentment to and notice of non-payment by the person who signed it. Presentment to another person, though such person be the real principal, is not effectual to bind the indorser. The word "agent," following the name of the maker, is, in the absence of the name of the principal, merely *descriptio personae*.

ACTION by J. T. Stinson & Co. against S. A. Cunningham as maker, and S. D. Lee as indorser, of a promissory note. The record did not show any disposition of the case as to the defendant S. A. Cunningham. The other facts are stated in the opinion.

J. E. Rives, for the appellants.

A. C. Bogle, for the appellee.

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COOPER, J. The demurrers to the original and amended declarations were properly sustained. Lee was the payee in a promissory note, subscribed by the maker thereof, "A. G. Cunningham, Agent," nothing appearing on the face of the note indicating for whom he professed to act as agent. After the maturity of the note, he indorsed the same to the plaintiffs, who some time thereafter presented the note to S. A. Cunningham, the wife of A. G. Cunningham, and who, the declaration avers, was his principal, "and demanded payment thereof, and sued out an attachment for rent against her, in order to collect said note, of all of which said Lee had immediate notice."

The present suit is against S. A. Cunningham as maker, and against Lee as indorser, of the note.

The liability of Lee rested wholly upon his indorsement, and that liability was, to pay the note if seasonable presentment to the maker should be made and payment refused, and Lee notified thereof.

A. G. Cunningham, and not S. A. Cunningham, was the maker of the note, the word "agent," following his signature, being, in the absence of the name of the principal, merely *descriptio personæ*: 1 Daniel on Negotiable Instruments, secs. 303-305. We are not called upon to decide whether, in a proper action, Mrs. S. A. Cunningham might be made liable on the consideration for which the note was given; nor whether, as between the original parties, A. G. Cunningham was liable on the note. The sole question is, whether Lee, who indorsed the note signed by "A. G. Cunningham, Agent," can be held on his indorsement by virtue of a presentment to one whose name nowhere appears on the note, and we think that he cannot, because such person was not the maker of the note, for whose default only was he bound by his indorsement.

Judgment affirmed.

PROMISSORY NOTE — LIABILITY OF AN INDORSER. — Demand must be made of an acceptor, and if made on any other person, will be improper: *Rice v. Bagland*, 10 Humph. 545; 53 Am. Dec. 737, and note. See note to *Wesson v. Garrison*, 58 Am. Dec. 674, for a discussion of the subject as to whom presentment for payment should be made.

Defendant was the indorser of a promissory note made by a copartnership. At its maturity, bankruptcy had dissolved the partnership. A demand of one of the former copartners was sufficient to charge defendant: *Gates v. Beecher*, 60 N. Y. 518; 19 Am. Rep. 207.

BROOKS v. BLACK.

[68 MISSISSIPPI, 161.]

COVENANT OF WARRANTY OF REMOTE VENDOR—MEASURE OF DAMAGES RECOVERABLE UPON, BY EVICTED VENDEE. — The measure of damages recoverable by an evicted vendee upon a covenant of warranty of a remote vendor is not limited to the price paid by such vendee to his immediate vendor, but is the value of the land at the time of its conveyance by such remote vendor, which value is conclusively determined by the price paid to him for it, together with interest on such price for so long a time as such evicted vendee has been held liable to the owner for mesne profits and the taxed costs expended by him in defending the suit in ejectment. But he cannot recover his attorney's fees, nor costs not taxed.

PROCEEDING to recover damages for breach of warranty. The opinion states the case.

George A. Evans, and Brame and Alexander, for the appellant.

Bogle and Bogle, for the appellee.

COOPER, J. This is a proceeding by attachment in chancery by the appellee, Black, against his remote vendor, Brooks, to recover damages for the breach of warranty of title to certain lands. In 1869 Brooks conveyed the land, with covenants of warranty, to one Spencer, the consideration being the sum of \$6,296. Spencer executed a deed of trust, with power of sale, to one Smith, to secure the payment of a debt of four hundred dollars to Graham, Black, & Co. In September, 1878, the debt secured being unpaid, the land was sold, as provided by the trust deed, and at such sale Black, the appellee, became the purchaser, at the price of one thousand dollars. After his purchase Black conveyed to Mrs. Spencer an undivided one-half interest in the land. Afterwards, the heirs at law of Mrs. Caroline Daves and Mrs. Neilson recovered in ejectment from Black and Mrs. Spencer the undivided one-half interest in the land, claiming under title paramount to that of Brooks. Brooks was not notified of the pendency of this action of ejectment. Black, by the result of that suit, having lost the one half of his half-interest in the land (the one fourth of the whole), seeks by the present proceeding to recover from Brooks one fourth of the consideration paid him by Spencer, and interest thereon, and the costs of defending the action of ejectment against the heirs of Daves and Neilson, including attorney's fees. The chancellor found as facts

that the title of the heirs of Mrs. Daves and Mrs. Neilson was paramount to that of Brooks; that the value of the land at the time of eviction was \$6,000; and that Black, in good faith, and in discharge of a legal duty, had defended the action of ejectment, and in so doing had expended in court costs the sum of \$249.91, and the further sum of \$200 for attorney's fees, which were reasonable. Upon these facts, he decreed that Brooks should pay to Black the sum of \$1,500, the same being the actual value of the land lost by Black, and less than one fourth of the purchase price paid to Brooks by Spencer, with interest at six per cent from January 1, 1888, the date of Black's eviction, and also the said sums of \$249.91 and \$200, the court costs and attorney's fees, with interest thereon from the commencement of this suit. Brooks appeals, and assigns for error,—1. That the court should have not made any decree against him, because the facts proved show that the debt secured by the deed of trust from Spencer to Smith, trustee, had been paid at and before the sale under said deed; 2. That the measure of damages should be the one fourth of the purchase price paid by Black, and not the one fourth of the value of the land at the time of eviction, nor the one fourth of purchase-money received by Brooks; 3. The court should not have allowed the court costs expended in defending the action of ejectment; 4. The court should not have allowed attorney's fee paid in defending said action.

It is sufficient to say, in reference to the first assignment of error, that the facts do not support appellant's contention.

The second assignment of error presents an interesting question which has never before been considered by this court, and so far as our researches have led, has not often arisen in other states. That question is, What is the measure of damages in a suit by an evicted vendee upon the covenant of warranty of a remote vendor running with land? May he recover the purchase price received by the remote vendor? or is he limited by the consideration he himself has paid? It is supposed by counsel for the appellant that the sum paid by the evicted party—the value of the land at the time of his purchase—is fixed as the measure of damages in this state by the case of *White v. Presly*, 54 Miss. 313. But the question was not raised by the record in that case; and although Chalmers, J., in delivering the opinion of the court, declares that the sum paid by the evicted party, with interest, the same being less than the sum received by the remote vendor, is a

correct measure of damages, the declaration does not thereby become decision. In that case, Huntington had sold land to one Jones, from whom the title had passed under execution sale to Presly. Presly lost the land by reason of title paramount to that of Huntington, and sued Huntington's administrator on the covenants of warranty, and recovered in the court below the sum he had paid at execution sale, and interest thereon, the same being less than Huntington had received. The administrator appealed. He, as appellant, could not assign as error the fact that damages less than should have been awarded had been given; nor could the appellee raise the point here, that the judgment he sought to maintain should have been for a greater sum. The observation of the judge was not upon any question sought to be raised, or which could have been decided, and therefore is not the decision of the court.

Among the first cases in which the liability of a vendor to his vendee for breach of the warranty for quiet possession was considered were *Staats v. Ten Eyck*, 3 Caines, 112, 2 Am. Dec. 254, and *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229. It was contended for the plaintiffs in these cases that the covenant was one of indemnity, and therefore that the measure of damages should be the value of the land at the time of the breach. In *Staats v. Ten Eyck*, recovery was sought for the appreciation in the value of the land above the price paid by natural causes, and in *Pitcher v. Livingston*, to recover above the purchase price the value of permanent improvements put upon the land by the vendee. The arguments for the plaintiffs were rested upon the rule of damages in breaches of personal covenants in other instances, but the court rejected the contention, and adopted, by analogy, the measure of damages applied in the common-law action of *warrantia chartæ*, and in suits for the breach of the covenant of seisin, viz., the value of the land determinable by the price paid the vendor; and since the vendee was liable to the real owner for mesne profits, he was also entitled to interest on the purchase-money for the time for which such mesne profits might be recovered against him. The measure of damages established in these cases has been so generally adopted in other states as to have become almost universal, and it would be superfluous to cite authorities in its support. It has been announced as the rule in this state: *Phipps v. Tarpley*, 31 Miss. 433. We refer to the cases above, not for the purpose of announcing the rule, which applies as

between vendor and vendee, for that is too well settled to admit of controversy, and is conceded by counsel for appellant; we note them to show that the suggestion now made that the covenant is one of indemnity was rejected by the court in the earliest cases. In a certain sense, all "covenants" are for indemnity; but the sense in which the word is now used in argument of counsel, that redress is to be afforded to the extent and within the limit of the actual loss sustained by the vendee, in an action against his immediate vendor, it may be confidently asserted is against the overwhelming current of authority. In these cases at least, the decisions are practically uniform, that, regardless of the value of the land at the time of eviction, the recovery is measured by the value of the land at the time of the conveyance, which value is conclusively fixed by the price paid by the vendee or received by the vendor. Another proposition may be confidently stated as supported by an equally uniform current of authority, that the covenant for quiet enjoyment runs with the land, and passes to all subsequent owners claiming in the chain of title. The purchaser of land gets, by operation of law, not only the land, but also the covenant of the first vendor, and that as well where the covenant is by its words to the vendee only, as where it is with him and his assigns. When we come, however, to the precise question now presented, which is whether a remote vendee may recover from the remote vendor the purchase-money paid by the first vendee or is limited to the amount paid by himself to his vendee, we find direct conflict in the decisions, and so far as we have found the cases, they are nearly equal in number on each side. In North Carolina, *Williams v. Beeman*, 2 Dev. 483; Minnesota, *Moore v. Frankenfield*, 25 Minn. 540; Tennessee, *Mette v. Dow*, 9 Lea, 93; *Whitzman v. Hirsh*, 87 Tenn. 513; and Maryland, *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480, — it is held that such remote vendee can only recover what he has paid to his own vendor. On the other hand, it is held in South Carolina, *Lowrance v. Robertson*, 10 S. C. 8; Iowa, *Mischke v. Baughn*, 52 Iowa, 528; and Kentucky, *Dougherty v. Duvall*, 9 B. Mon. 57, — that such vendee may recover the full consideration received by the defendant, the remote vendor. *Williams v. Beeman* was decided by a divided court, Ruffin, J., dissenting, and *Mette v. Dow* (followed by *Whitzman v. Hirsh*) overruled *Hopkins v. Lane*, 9 Yerg. 79. In *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480, the court declares that it had carefully

examined many authorities upon the point, and that the decided weight of authority was, that the plaintiff could not recover on the warranty of a remote vendor more than he had himself paid to his immediate vendor; and in support of this declaration cites the following cases: *Booker v. Bell's Ex'rs*, 3 Bibb, 175; 6 Am. Dec. 641; *Kelly v. Dutch Church*, 2 Hill, 116; *Bennet v. Jenkins*, 13 Johns. 51; *Hanson v. Buckner*, 4 Dana, 253; 29 Am. Dec. 401; *Wyman v. Ballard*, 12 Mass. 304; *Stewart v. Drake*, 9 N. J. L. 142; *Wilson v. Forbes*, 2 Dev. 39; *Pitcher v. Livingston*, 4 Johns. 1; 4 Am. Dec. 228. We have examined these cases, and find all of them except *Kelly v. Dutch Church* to be suits by the immediate vendee or his heirs at law against the immediate vendor or his personal representative. *Kelly v. Dutch Church* was a suit by the assignee of the lessee against the lessors of his assignor. The trial court had awarded, as damages, the rent reserved in the lease; thus, as it seems to us, making the sum paid to the lessors, and not that paid for the assignment, the measure of damages. But the facts are not very clearly stated, and the case cannot be held to decide anything upon the point. The question seems to have been more fully examined upon principle in the cases of *Williams v. Beeman*, 2 Dev. 483, *Mette v. Dow*, 9 Lea, 93, and *Lowrance v. Robertson*, 10 S. C. 8, than in any other. In *Williams v. Beeman*, the majority of the court thought that the remote vendee was suing to recover his own damages, and not those of the first vendee, and therefore should be restricted to the actual damages he had sustained. In *Mette v. Dow*, the court compared the covenant to a penal bond, the recovery on which would be limited to the actual damages sustained by the party suing. The dissenting opinion of Ruffin, J., in *Williams v. Beeman*, is, in our opinion, a complete reply to this position. He says: "The value at the time of the sale by the first vendor is the measure prescribed. It ought to operate both ways. If the vendor be not liable for more, he ought not to be for less. I understand it to be admitted that if his immediate vendee be evicted, he is still liable for that. I do not see why he should not be equally so to the assignee as his vendee. Does the assignment change his covenant? It runs with the land, and he who buys the land buys the covenant. He gets the whole of it. But it is said that the assignor in such case cannot recover from the first vendor more than the evicted vendee gave for the land, because this is all

the assignor would be obliged to pay the assignee, and therefore he has complete indemnity. This is changing the rule essentially. It puts it upon the amount of the loss, not the price paid. It would seem to me that whoever buys land with a covenant adhering to it takes it with all the advantages it conferred on his assignor. It is so in personal contracts, for we do not inquire what the assignee of a bond gave for it. The obligor must pay him the whole." This argument seems to us unanswerable. It at least never has been answered in any case we have seen. When it is conceded that, by his covenant, a vendor binds himself to return the purchase price he receives in the contingency of a failure of the title conveyed, and that this obligation is assigned, by operation of law, to whoever may succeed to the title, it would seem to follow, as a corollary, that the recovery, by whomsoever had, ought to be equal to the obligation. But under the rule announced in Maryland, Minnesota, Tennessee, and North Carolina, the obligation of the covenantor is variable, and dependent upon transactions with which he is not connected. In these states, a man selling an estate to A for five thousand dollars would be liable to pay A that sum if he should be evicted. But if A sells the same land to B for five hundred dollars, the liability of the first vendor is reduced to that sum, and thus B, the purchaser from A, gets less than the obligation A held. But if B sells to C for five thousand dollars, the original obligation revives, and the absurdity is presented of B's failing to get, and therefore to have, what A owned, and still transferring to C that which he never had. The rule announced in Kentucky, Iowa, and South Carolina is not only commended by its justice, and by analogy to other well-settled principles, but possesses the advantage of stability and uniformity. As we have said, it is quite generally held that by the covenant for quiet enjoyment the grantor binds himself to pay, in event of failure of title, the then value of the land, which value is determined by the price paid. Appreciation by natural causes, or by improvements put upon the property by the vendee, does not enlarge his liability; nor is it decreased by depreciation in value from any cause. By legal intendment the obligation is as though the covenantor should say to the covenantee: "You, or the person succeeding to the title I convey, shall hold the land, or if you cannot, by reason of title in another, the money I have received shall be restored in lieu of the

land." We are unable to perceive any principle upon which this obligation shall be diminished because of the price, in consideration of which it may be assigned. We therefore conclude that the obligation of the covenantor is the same to the assignee that it was to the covenantee, and being such, is governed by the same measure of damages.

The third and fourth assignments of error present the question whether taxed costs and attorney's fees in excess of the purchase price, and interest thereon, may be recovered on the covenant. We are unable to discover any just principle upon which costs, whether taxed or otherwise, have been allowed to plaintiffs over and above the purchase price received by the covenantor, and interest thereon. We readily perceive the justice of the rule by which the value of the land at the time of the sale by him is accepted as the measure of the liability of the covenantor, and also that the price paid shall be taken as conclusive evidence of that value. We also appreciate the fairness of allowing interest on the purchase-money as compensation to the covenantee for so long a time as he has been held liable to the owner for mesne profits. But why costs in excess of the purchase-money and interest have ever been allowed we cannot conjecture. In 4 Kent's Com. 476, it is said: "The measure of damages on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs." How costs, which are uncertain in amount, varying with reference to the character of the suit, the number of witnesses, and the nature of the issues presented in a proceeding, could ever have been supposed to furnish any light upon the past value of lands, passes our comprehension. But so it is that by practically an unbroken current of authority the rule has been established that they may be recovered in addition to the purchase price and interest: Rawle on Covenants, c. 9; Sutherland on Damages, 302; 4 Am. & Eng. Ency. of Law, 566. Believing that the rule allowing any costs should never have been established, we decline to extend it beyond the limits of the taxed costs of the case. Attorney's fees have been allowed in some states, and disallowed in others. The conflict in these decisions will be found in the cases cited by the text-writers and the encyclopædia above referred to. Constrained by authority to allow the taxed costs, we return to correct principles at the first

point at which we may do so, and hold that the attorney's fees paid by the covenantor are not recoverable on the covenant of the grantor. In this cause the court allowed the defendant an attorney's fee, which, added to the taxed costs and other damages, exceeded the value of the land at the time of the sale, and interest thereon, and taxed costs. But since the court also erred in fixing the value of the land at \$6,000, its value at the time of eviction, instead of \$6,296, the price paid to the defendant, both errors must be corrected to make a proper result.

The decree is reversed, and decree here.

DAMAGES RECOVERABLE ON BREACH OF WARRANTY OF TITLE. — After some fluctuation in the earlier decisions of some of the older states of the Union, the rule now firmly established in nearly all of the states is, that the measure of damages for a total breach of the covenant of warranty of title in a deed of land is the consideration, or the value of the land at the time of the sale as then agreed upon by the parties, or as determined by the price paid, with interest on that sum for such time as the purchaser has been deprived of, or is accountable to the superior owner for, the *mesne profits*, together with the costs and expenses incurred in defending the action in which the injured party has been evicted: 4 Kent's Com. 476; Rawle on Covenants, c. 9; 1 Sedgwick on Damages, 338; 3 Washburn on Real Property, 423; 2 Sutherland on Damages, 280; 4 Am. & Eng. Ency. of Law, 566; Wood's Mayne on Damages, sec. 252; *Kingsbury v. Milner*, 69 Ala. 502; *McGary v. Hastings*, 39 Cal. 360; *Davis v. Smith*, 5 Ga. 274; 48 Am. Dec. 279; *Whitlock v. Crew*, 28 Ga. 289; *Harding v. Larkin*, 41 Ill. 413; *Wood v. Kingston Coal Co.*, 48 Ill. 356; *Phillips v. Reichert*, 17 Ind. 120; *Burton v. Reeds*, 20 Ind. 87; *Cincinnati etc. R. R. Co. v. Pearce*, 28 Ind. 502; *Williamson v. Test*, 24 Iowa, 138; *Stebbins v. Wolf*, 33 Kan. 765; *Cox v. Strode*, 2 Bibb, 273; 5 Am. Dec. 603; *Pence's Heirs v. Duvall's Heirs*, 9 B. Mon. 48; *Robertson v. Lemon*, 2 Bush, 301; *Crisfield v. Storr*, 36 Md. 129; *Devine v. Lewis*, 38 Minn. 24; *Phipps v. Tarpley*, 31 Miss. 433; *Dickson v. Desiré's Adm'r*, 23 Mo. 151; 66 Am. Dec. 661; *Hutchins v. Roundtree*, 77 Mo. 500; *Lambert v. Estes*, 99 Mo. 604; *Taylor v. Holter*, 1 Mont. 688; *Dalton v. Bowber*, 8 Nev. 190; *Drew v. Towle*, 30 N. H. 531; *Foster v. Thompson*, 41 N. H. 373; *Winnepiseogee Paper Co. v. Eaton*, 65 N. H. 13; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 304; *Staats v. Ten Eyck's Ex'rs*, 3 Caines, 111; 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1; 4 Am. Dec. 229; *Bennet v. Jenkins*, 13 Johns. 50; *Kinney v. Watts*, 14 Wend. 38; *Williams v. Breman*, 2 Dev. 483; *West v. West*, 76 N. C. 45; *Clark v. Parr*, 14 Ohio, 118; 45 Am. Dec. 529; *Lloyd v. Quimby*, 5 Ohio St. 262; *Cathcart v. Bowman*, 5 Pa. St. 317; *Brown v. Dickson*, 12 Pa. St. 372; *McClure v. Gamble*, 27 Pa. St. 288; *Cox v. Henry*, 32 Pa. St. 18; *Furman v. Elmore*, 2 Nott & McC. 189; *Lowrance v. Robertson*, 10 Rich. 8; *Elliott v. Thompson*, 4 Humph. 99; 40 Am. Dec. 630; *Mette v. Dow*, 9 Lea, 93; *Brown v. Hearon*, 66 Tex. 63; *Stout v. Jackson*, 2 Rand. 132; *Lowther v. Commonwealth*, 1 Hen. & M. 202; *Jackson v. Turner*, 5 Leigh, 119; *Click v. Green*, 77 Va. 827; *McInnis v. Lyman*, 62 Wis. 191; *Conrad v. Trustees of Druids' Grand Grove*, 64 Wis. 258. The reasons for the adoption of this rule of damages

are ably presented by Kent, C. J., delivering the opinion of the court in the leading case in New York of *Staats v. Ten Eyck's Ex'rs*, 3 Caines, 111, 2 Am. Dec. 254, and by Van Ness, J., Spencer, J., and Kent, C. J., in the case of *Pitcher v. Livingston*, 4 Johns. 1; 4 Am. Dec. 229. In the states of Connecticut, Maine, Massachusetts, and Vermont, a different rule was adopted at an early date and is still adhered to. In those states the courts hold that the correct measure of damages for a total breach of warranty of title is the value of the land at the date of the eviction, with interest and the costs and expenses of the suit in which the injured party has been evicted: *Horsford v. Wright*, Kirby, 3; 1 Am. Dec. 8; *Stirling v. Peet*, 14 Conn. 245; *Cushman v. Blanchard*, 2 Greenl. 266; 11 Am. Dec. 76; *Williamson v. Williamson*, 71 Me. 442; *Gore v. Brazier*, 3 Mass. 523; 3 Am. Dec. 182; *Wyman v. Ballard*, 12 Mass. 304; *Norton v. Babcock*, 2 Met. 510; *White v. Whitney*, 3 Met. 81; *Ceconni v. Rouden*, 147 Mass. 164; *Drury v. Chipman*, 1 D. Chip. 110; 1 Am. Dec. 704; *Keeler v. Wood*, 30 Vt. 242; *Smith v. Sprague*, 40 Vt. 43. Under the rule in these cases the value of the improvements made by the evicted tenant is included in the damages. It will be seen by reference to the note to *Mecklem v. Bates*, 99 Am. Dec. 73, that the rule of damages in case of a breach of warranty of title adopted in most of the states is the same as that everywhere applied in case of a breach of covenant of seisin or good right to convey, and most of what is there written is applicable to the present discussion.

DAMAGES RECOVERABLE IN CASE OF PARTIAL EVICTION. — Where the eviction is partial, the damages will bear the same proportion to the whole consideration paid when that is taken as the measure, or to the whole value of the property at the time of eviction when it is taken as the measure, that the value of the part to which the title fails bears to the whole premises, estimated at the price paid, or at the value at the time of eviction, as the case may be: 1 Sedgwick on Damages, 7th ed., 339; *Griffin v. Reynolds*, 17 How. 609; *Major v. Dunnavant*, 25 Ill. 262; *Phillips v. Reichert*, 17 Ind. 120; *Mischke v. Baughn*, 52 Iowa, 528; *Dougherty v. Duvall's Heirs*, 9 B. Mon. 57; *Hunt v. Orwig*, 17 B. Mon. 73; *Cornell v. Jackson*, 3 Cush. 506; *Boyle v. Edwards*, 114 Mass. 373; *Long v. Sinclair*, 40 Mich. 569; *Dalton v. Bowker*, 8 Nev. 190; *Winnepiscogues Paper Co. v. Eaton*, 65 N. H. 13; *Adams v. Conover*, 22 Hun, 424; *Williams v. Beeman*, 2 Dev. 483; *King v. Pyle*, 8 Serg. & R. 166; *Beaupland v. McKeen*, 28 Pa. St. 124; *Austin v. McKinney*, 5 Lea, 488; *Mette v. Dow*, 9 Lea, 93; *Kenney v. Norton*, 10 Heisk. 388; *Whitman v. Hirsch*, 87 Tenn. 513; *Raines v. Calloway*, 27 Tex. 673. If, however, a specific price was paid for several parcels, then only the specific price paid for the parcel lost can be recovered as damages: *Dimmick v. Lockwood*, 10 Wend. 142. And where a grantor conveys a tract of land with warranty, of which he owns only an equal undivided half, one half of the consideration, or value, can be recovered: *Downer v. Smith*, 38 Vt. 464.

DAMAGES RECOVERABLE WHERE GRANTEE PURCHASES OUTSTANDING TITLE. — Where the warrantee or his grantee in good faith buys in an outstanding paramount title, he may recover as damages what he paid for such paramount title, provided it does not exceed the price paid to the warrantor, together with interest on what he paid from the date of its payment: *Collier v. Cowger*, 52 Ark. 322; *McGary v. Hastings*, 39 Cal. 360; *Amos v. Cosby*, 74 Ga. 793; *Clapp v. Herdman*, 25 Ill. App. 509; *Burk v. Clements*, 16 Ind. 132; *Snell v. Iowa Homestead Co.*, 59 Iowa, 701; *Royer v. Foster*, 62 Iowa, 321; *Hooper v. Sac Co. Bank*, 72 Iowa, 280; *Andrews v. Appel*, 22 Hun, 429; *Cowdrey v. Coit*, 44 N. Y. 382; 4 Am. Rep. 690; *Price v. Deal*, 90 N. C. 290.

INTEREST, WHEN AND FOR WHAT TIME RECOVERABLE. — Where a purchaser has received rents and profits, these are presumed to be equivalent to interest on the money he has paid for the land. In estimating his damages, therefore, interest is allowed to him only for the time for which he has lost the rents and profits, or for which he is accountable for them to the owner of the paramount title: *Collier v. Couger*, 52 Ark. 322; *Whitlock v. Oress*, 28 Ga. 289; *Harding v. Larkin*, 41 Ill. 413; *Stebbins v. Wolf*, 33 Kan. 765; *Danforth v. Smith*, 41 Kan. 146; *Thompson v. Jones*, 11 B. Mon. 365; *Hutchins v. Roundtree*, 77 Mo. 500; *Clark v. Parr*, 14 Ohio, 118; 45 Am. Dec. 529; *Cox v. Henry*, 32 Pa. St. 18; *Mette v. Dow*, 9 Lea, 93; *Brown v. Hearn*, 66 Tex. 63; *Flint v. Steadman*, 36 Vt. 210.

ATTORNEY'S FEES, WHETHER RECOVERABLE AS DAMAGES. — On the question of the allowance of attorney's fees in the action in which the injured party is evicted, there is a decided conflict in the authorities. In the following cases attorney's fees were held to be recoverable: *Levitky v. Canning*, 33 Cal. 299; *Harding v. Larkin*, 41 Ill. 413; *Robertson v. Lemon*, 2 Bush, 301; *Taylor v. Holter*, 1 Mont. 688; *Dalton v. Bowker*, 8 Nev. 190; *Lane v. Fury*, 31 Ohio St. 574; *Keeler v. Wood*, 30 Vt. 242; *Smith v. Sprague*, 40 Vt. 43. In the following cases it was held that attorney's fees should not be allowed: *Williams v. Leblanc*, 14 La. Ann. 757; *Late v. Armorer*, 14 La. Ann. 826; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Jeter v. Glenn*, 9 Rich. 374; *Ex parte Lynch*, 25 S. C. 193; *Williams v. Burg*, 9 Lea, 455.

DAMAGES RECOVERABLE BY REMOTE VENDEE. — So far as we have been able to find, there are but eight states in which the question as to what damages a remote vendee may recover in an action against his remote vendor for breach of warranty of title has been directly passed upon, and they are equally divided on the question. In Maryland, Minnesota, North Carolina, and Tennessee, it is held that the remote vendee can only recover what he has paid to his own vendor, with interest and costs: *Crisfield v. Storr*, 36 Md. 129; 11 Am. Rep. 480; *Moore v. Frankenfield*, 25 Minn. 540; *Williams v. Beeman*, 2 Dev. 483; *Markland v. Crump*, 1 Dev. & B. 94; 27 Am. Dec. 230; *Mette v. Dow*, 9 Lea, 93; *Whitman v. Hirsh*, 87 Tenn. 513. In Iowa, Kentucky, Mississippi, and South Carolina, it is held that he can recover the full amount of the consideration received by the remote vendor, with interest and costs: *Mischke v. Baughn*, 52 Iowa, 528; *Dougherty v. Duvall's Heirs*, 9 B. Mon. 57; *Lovrance v. Robertson*, 10 Rich. 8. The subject is so fully discussed in the principal case that its further consideration here is unnecessary.

DAMAGES IN CASE OF EXCHANGE OF LANDS. — When lands are exchanged, and the title to one of the tracts, which in the exchange between the parties was conveyed with general warranty, fails, a recovery may be had against the grantor for the value of the land, with interest and costs, and the value fixed and agreed upon at the time of the exchange will be taken to be the true measure of the damages recoverable: *White v. Street*, 67 Tex. 177. So where the consideration is personal property, it is proper to take the value which the parties put upon it at the time, rather than its real value: *Williamson v. Test*, 24 Iowa, 138.

LOWENSTEIN & BROS. v. BEW & Co.

[68 MISSISSIPPI, 255.]

INSOLVENT MERCHANT NOT LIABLE TO ATTACHMENT FOR SHIPPING COTTON OUT OF STATE WHEN. — An insolvent merchant residing in Mississippi does not subject himself to attachment by shipping to his commission merchant in another state cotton to be there sold and the proceeds applied to the payment of a debt due to the latter, where the debt exceeds the value of the cotton so shipped.

PROCEEDINGS in attachment instituted by B. Lowenstein & Bros. against J. T. Bew & Co. The defendants traversed the attachment, and a trial was had, resulting in a verdict and judgment for the defendants, from which plaintiffs appealed. On the trial it was shown that Bew & Co. had shipped out of the state to Chaffie and Powell of New Orleans about six hundred bales of cotton, and that after shipping this cotton they did not have enough property in this state to pay their debts. But the defendants showed that the cotton was shipped in pursuance of a trust deed made by them to Chaffie and Powell, and that the value of the cotton was less than the indebtedness due to Chaffie and Powell under the trust deed.

Rush and Gardner, A. H. Longino, and A. H. Whitfield, for the appellants.

Nugent and McWillie, for the appellees.

COOPER, J. The controlling question in this case is, whether an insolvent merchant residing in this state subjects himself to attachment by shipping to his commission merchant in another state cotton to be there sold and the proceeds applied to the payment of a debt due to such commission merchant, the debt exceeding the value of the cotton so shipped. The circuit judge instructed the jury that such circumstances were not ground for attachment under the second clause of section 2415 of the code, which subjects to attachment one who "has removed or is about to remove himself or his property out of this state," and we think correctly so ruled. A literal construction of the statute would, it is clear, subject one to attachment under the circumstances named; but it was settled at an early day in this state that the "removal" of person or property within the meaning of the law must be such as to impair or jeopardize the remedy of creditors for the collection of their debts. It is, of course, impossible to specify in advance exactly what facts would place a defendant within

or without the operation of the statute, but the principle which controls is distinct and simple. The difficulty is the common one of applying it to the facts. An examination of the decisions in this state and some of those elsewhere will illustrate the uniformity with which the courts have adhered to the principle of protecting the rights of creditors, and limited the language of statutes to this purpose and end. In *Montague v. Gaddis*, 37 Miss. 458, the debtor was about to remove a considerable portion of his property from the state, but retained in it ample property subject to execution for the payment of all his debts. The trial court held that he was not subject to attachment, and examining the subject the court said: "The object of the statute allowing attachments for debts is to afford the creditor a security for his debt in case the debtor is about to remove his property out of this state, so as to deprive the creditor of the collection of his debt in this state. The principle upon which the statute proceeds is the danger of loss of the debt by the removal of the defendant's property; and this reason fails, and the remedy provided by the statute plainly does not apply, when the debtor is removing a part of his property, but does not remove or intend to remove another part of it, subject to the payment of the debt, amply sufficient to satisfy it, and accessible to the creditor's execution, and such portion of his property remains in his possession openly subject to execution. For when property to such an amount, and so situated, remains in the possession of the debtor, and is not about to be removed from the state, it could not be justly said that the creditor's debt would be in danger of being lost by the removal of another part of the debtor's property from the state." In *Myers v. Farrell*, 47 Miss. 282, and *Pickard v. Samuels*, 64 Miss. 822, the principle of *Montague v. Gaddis*, 37 Miss. 458, is reaffirmed. In *Stephenson v. Sloan*, 65 Miss. 407, there was a delivery by the debtor of certain cotton to the creditor, to be by him shipped out of the state and sold, and out of the proceeds of sale to pay the debt due, the balance to be returned to the debtor. The debt there was less than the value of the cotton; and since the transaction was in effect to send the property beyond the state to be converted into money, a part of which was to return to the debtor, it was held ground for attachment. *Haber v. Nassitts*, 12 Fla. 589, rested upon facts almost identical with *Montague v. Gaddis*, 37 Miss. 458, and the same conclusion was reached as in that case. *Mack v.*

McDaniel, 2 McCrary, 198, was a case in which an insolvent merchant converted his property into cotton, and shipped the same out of the state for sale. This was held ground for attachment. That case, it will be seen, is similar in its facts to *Stephenson v. Sloan*, 65 Miss. 407, the controlling facts in each being that the sending of the cotton beyond the state was but a step in the process of converting it into money to be returned to the debtor, whereby it would be withdrawn from seizure under execution.

We cannot yield our assent to the suggestions of counsel that since it is lawful for an insolvent debtor to convert his property into money in this state in the usual course of trade, and without a fraudulent purpose, he may also, in like usual course of business, remove it beyond the state, to be there converted into money to be returned to him in this state. The statute regulating attachment is materially different in respect to the two transactions. A debtor, though insolvent, may lawfully convert his property into money or evidences of debt in this state, unless his intent in so doing is to place it beyond the reach of creditors. It is only the fraudulent conversion of property into money in the state that subjects the debtor to attachment. On the other hand, the statute expressly declares that the removal of property from the state is ground of attachment. It is not necessary that the removal shall be with a fraudulent purpose, for the mere removal either withdraws the property from subjection to the claims of creditors, or imposes on them the necessity of going without the state to subject it. It cannot be permitted a man to do what the law forbids to be done, because either of a course of business or of the inconveniences which may result from a conformity to the law. But, as was forcibly said by Caldwell, J., in *Mack v. McDaniel*, 2 McCrary, 198, it does not lie with an insolvent to claim the benefit of a course of business applicable to solvent merchants. If insolvent merchants are accustomed to send their cotton out of this state to be converted into money to be thereafter returned to or controlled by them, it is a course of business that subjects each of them to attachment. A multitude of precedent wrongs cannot justify another and later one. But, as we have said, it is not every removal of property from the state that will warrant an attachment. A temporary removal of property in good faith, really and apparently, a removal of exempt property, or the removal of a portion of one's estate, leaving in the state ample visible property to answer

the demands of all creditors, while within the letter of the statute, would not be covered by it, for the reason given in *Montague v. Gaddis*, 37 Miss. 453, that it applies only to such removals as impose danger of loss to creditors. To subject a debtor to attachment under the circumstances of the present case would be to impose a penalty upon him for doing what the law approves. The cotton shipped by the defendants was of far less value than the debt it was consigned to pay. No creditor could by possibility be injured by the fact that it was to be sold beyond the state, and its proceeds there applied to debts equally binding upon the debtors as were those of other creditors. If the shipments had been for the purpose of conversion into money to be returned to the debtors, thereby putting it within their power to pay it to creditors or to convert it to their own use, there would have been danger of loss to creditors, as in *Stephenson v. Sloan*, 65 Miss. 407; and this danger of loss would have brought the transaction within the condemnation of the statute. In the absence of such conditions, the principle announced in *Montague v. Gaddis*, 37 Miss. 453, controls, and the court below was correct in so ruling. We consider it unnecessary to say more in reference to the other errors assigned than that we have considered them and find nothing of error therein.

The judgment is affirmed.

ATTACHMENT — REMOVING GOODS FROM STATE.— To authorize an attachment on the ground that defendant has removed his property out of the state, it must appear that he has not sufficient property left in the state subject to execution to satisfy plaintiff's claim, and also that the collection of plaintiff's claim will be endangered by delay in obtaining judgment, or a *nulla bona* return: *Francis v. Burnett*, 84 Ky. 23. The shipping of cotton by defendant from the state by the usual method, with an honest purpose of trade, having sufficient property still in the state to pay his debts, does not constitute a ground of attachment against him: *Stewart v. Cole*, 46 Ala. 648. In accord with the principal case is *Rice v. Pertuis*, 40 Ark. 157, in which the court held that the shipping of cotton by an insolvent debtor to a creditor in another state, to be applied in payment of a debt due the latter, no fraud being intended, would not authorize the issue of an attachment against the debtor.

CAMPE v. SAUCIER.

[103 MISSISSIPPI, 372.]

JUDICIAL SALE OF LAND IS NOT COMPLETE UNTIL CONFIRMED by the court, and the bid of the purchaser, where the sale is for cash, is not demandable until such confirmation. Where, therefore, a purchaser at such a sale refuses to pay the amount of his bid, and the commissioner thereupon readvertises and resells the land for a lower price, and reports all the facts to the court, which ratifies and approves the resale, no action is maintainable against him by reason of his bid; for he was not in default. Under such circumstances, the sale must be held to have been abandoned before its consummation.

ACTION to recover the difference between the defendant's bid at a judicial sale of land and the amount obtained for the same on a resale. A commissioner was appointed by the chancery court in a partition proceeding to sell certain lands and divide the proceeds among the owners. At the sale under the decree, Campe was the highest bidder, and the property was struck off to him, but he refused to pay his bid. The commissioner did not then report to the court, but several weeks later, without any other order, he readvertised and resold the lands at a lower price. No deed was tendered to Campe, nor was he cited to appear and show cause why he refused to comply with his bid, or why a resale should not be made at his risk. The commissioner reported all the facts to the next term of the court, whereupon it confirmed the last sale, and directed deeds to be executed to the purchasers. The original owners then brought this action, and recovered a verdict and judgment, from which the defendant appealed.

Elliott Henderson, for the appellant.

T. S. Ford and E. J. Bowers, for the appellee.

CAMPBELL, J. This case presents several questions, but as one of them is decisive of the controversy, we confine our examination and decision to it. Did the commissioner for the sale of the land have the right to resell it as he did? and is Campe liable in this action for the difference in what the land was bid off for at the first sale and the second? The efforts of counsel and ourselves have failed to produce a single precedent for such an action. The nearest approach to it is *Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 362, cited by counsel for the appellee. That is an action by an administrator, who sold a negro at public outcry, and upon the refusal of the highest bidder to comply with the terms of the sale, imme-

diately resold to the highest bidder, and sued the first-mentioned bidder for the difference between his bid and the lower price for which the property went on the resale, and he was held to be entitled to recover. We would follow that case upon a similar state of facts, but the case before us is widely different, resulting from the difference between real and personal property, and the modes of dealing with them. The settled doctrine in this state, as elsewhere, with respect to judicial sales of land, such as this was, is, that the court is the vendor, through the commissioner as its representative, and that the sale is not complete until it has been confirmed by the court; and from this it results that the money, where the sale is for cash, is not demandable until confirmation of the sale by the court. Until then, no conveyance should be made to the purchaser, who must be ready to fulfill his contract when the court confirms the sale, and has until then to do it: *Tooley v. Gridley*, 8 Smedes & M. 493; 41 Am. Dec. 628; *Sanders v. Dowell*, 7 Smedes & M. 206; *Gowan v. Jones*, 10 Smedes & M. 164; *Henderson v. Herrod*, 23 Miss. 484; *Coulter v. Herrod*, 27 Miss. 685; *Mitchell v. Harris*, 48 Miss. 314; *Redus v. Hayden*, 43 Miss. 614; *State v. Cox*, 62 Miss. 786; Daniell's Chancery Pleading and Practice, *1274 et seq.; 12 Am. & Eng. Ency. of Law, 219; *Cruikshank v. Luttrell*, 67 Ala. 318.

The course for the commissioner was to report to the court the sale he made, and to let the court deal with the buyer, for which it had ample power: Daniell's Chancery Pleading and Practice, *1281; 2 Jones on Mortgages, secs. 1642 et seq.; note to *Mount v. Brown*, 69 Am. Dec. 369. As this course was not pursued, but the commissioner readvertised and resold the land, and reported his action to the court, which, with information by the report that the land had been bid off by Campe, who refused to stand by his bid, ratified and approved the resale by the commissioner, the sale to Campe must be held to have been abandoned before its consummation, and no action is maintainable against him by reason of his bid. He was not in default.

The case of *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297, cited by counsel for the appellee, shows that the sale was duly reported to the court, which ratified the sale, and directed a resale of the land on the terms of the first sale, at the risk of the party who was the highest bidder at the first sale, and had refused to comply with the terms of sale. That

case is an authority for what we regard as the correct practice in such cases.

In a note to *Mount v. Brown*, 33 Miss. 566, on p. 369, 69 Am. Dec., it is laid down that, besides the modes of enforcing the bidder's liability by the court making the sale, there are two remedies at law, and that an action at law may be brought upon the purchaser's notes or bonds given for the payment of the purchase-money, and that the "officer of the court who makes the sale may sue at law to recover the amount bid, or the deficiency arising upon a resale; for the remedy in equity to compel by summary process the purchaser to complete his purchase or pay the deficiency on a resale is cumulative, not exclusive"; and *Townshend v. Simon*, 88 N. J. L. 239, *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636, and two Louisiana cases, are cited in support of the last-mentioned proposition.

There can be no dispute as to the other, viz., that an action at law is maintainable by the payee of a note or bond, but the cases cited for the last do not decide anything more than that the officer who made a sale upon the condition, in writing, among others, "that if the purchaser fail to comply with the conditions of sale, the property would be resold, and the former purchaser held liable for all losses and expenses," etc., could maintain an action against one who bid off the property, and signed at the foot of the conditions of sale a written acknowledgment of his purchase, and afterwards refused to complete the purchase by accepting a deed and paying the purchase-money, to recover the difference between his bid and the price realized at the second sale, etc.

This is merely to assert that one of the parties to a written contract may sue the other for its breach, to which we assent; but the cases cited do not maintain the right of action in the case we are considering. The cases cited as being in the Louisiana reports rest upon statutory regulations, and may be laid out of view. In 12 Am. & Eng. Ency. of Law, 234, is the same statement found as in 69 American Decisions, and quoted above, and the case of *Townshend v. Simon*, 88 N. J. L. 239, cited, upon which we have already remarked.

It may seem incongruous to sustain an action by a sheriff, or an administrator, in the state of case disclosed by *Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 362, or upon the facts in the New Jersey cases, and to refuse to do it in the state of case here presented; but it is a corollary from the established

doctrine in this state, and in other states, and in England, that a sale like this is not complete until confirmation, and until then there is no right in the person selling to complete the sale by demanding the money, and making a conveyance, and therefore there was no default by Campe, and the subsequent action of the commissioner and the court precluded his being put in default, and thus he escaped all liability.

There is no advantage in having a right to sue at law for a difference in bids, as in *Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 369, because the power of the court making the sale is ample to enforce any liability of the bidder, if he is solvent, and if he is not, a recovery against him at law would be fruitless, except to impose cost on the party suing.

Reversed and remanded.

JUDICIAL SALES — NECESSITY OF CONFIRMATION. — A sale by the court of the lands of the estate of a decedent does not divest the heirs of title until after confirmation: *Greenough v. Small*, 137 Pa. St. 132; 21 Am. St. Rep. 859, and note; *Apel v. Kelsey*, 52 Ark. 341; 20 Am. St. Rep. 183. After confirmation of a chancery sale, the title is in the purchaser: *Houston v. Aycock*, 5 Sneed, 406, 73 Am. Dec. 431, and note. A sale under a decree is not conclusive until confirmed: *Taylor v. Cooper*, 10 Leigh, 317; 34 Am. Dec. 737; *Morrow v. McGregor*, 49 Ark. 67; *Barling v. Peters*, 134 Ill. 607.

DABNEY v. HUDSON.

[68 MISSISSIPPI, 292.]

OFFICER DE FACTO, WHO IS NOT. — A mere intruder into an office, acting without color of right, and without recognition by the public, cannot be regarded as an officer *de facto*. Where, therefore, a person elected justice of the peace for a term beginning January 6th, who qualifies and receives from his predecessor the docket on the 1st of January, — both believing the term to begin on that day, — issues a writ of replevin on January 4th, the writ is void, and its issuance is not the act of a *de facto* officer.

THE opinion states the case.

Perkins and Percy, for the appellant.

McKenzie and Wall, for the appellee.

COOPER, J. At the November election in the year 1889, one Hughey was elected a justice of the peace for the third district in De Soto County for the term of two years, to begin on the first Monday of January thereafter. One Stewart was the predecessor of Hughey, and he continued to reside in the district until after the beginning of the term for which Hughey

had been elected, — January 6, 1890. Both Stewart and Hughey seem to have rested under the belief that the term of Stewart ended and that of Hughey began on the first day instead of the first Monday of January; for on that day Stewart delivered and Hughey received the docket belonging to the justice of that district, and thereafter Stewart performed no official act. On the second day of January, 1890, an affidavit was made before Hughey for the writ of replevin in this cause, which writ was issued by him on the fourth day of January. At these dates Hughey had filed his bond as a justice of the peace for the term for which he had been elected, but had not taken the oath of office.

The administration of the oath to the plaintiff in replevin for the writ and the issuance of the writ were the first and only official acts done by him, and so far as the record shows, no part of the public, except Stewart, had recognized his claim to be then an officer. The writ was returnable on January 11th, on which day a judgment by default was rendered by Hughey in favor of the plaintiff, from which judgment the defendant appealed to the circuit court, and there moved to quash the writ of replevin on the ground that Hughey was neither a *de jure* nor *de facto* officer at the time of its issuance. This motion was submitted on an agreed state of facts, the substance of which we have stated, and the court overruled the motion. This action raises the first and principal error assigned.

We have examined many decisions upon the question involved, and find in the general discussion of the subject no little confusion, or, to be more accurate, an absence of clear and definite statement of what is or is not sufficient to clothe one professing to act officially with the character of a *de facto* officer. Expressions are found in several cases to the effect that there must be a colorable appointment or election to the office to constitute the person acting a *de facto* officer. In *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, Butler, C. J., in an elaborate and careful opinion, examined the cases so intimating or deciding, and demonstrates the error, in principle, of their decisions, and also shows them to be opposed to the decided preponderance in number of English and American cases.

It has also been sometimes suggested, even by the most distinguished judges, that the validity of the act of one claiming to be an officer cannot be inquired into in a collateral

controversy between third persons, because the officer not being a party to the proceeding, it would be unjust to him to permit his title to be put in issue and decided: Pearson, C. J., in *Fowler v. Bebee*, 9 Mass. 231; 6 Am. Dec. 62; Ruffin, C. J., in *Burke v. Elliott*, 4 Ired. 355; 42 Am. Rep. 142. But it is clear that the rule rests upon no such foundation, for if it did, the title of a mere usurper could not be controverted, for he would not be a party to the suit, and his right differs in degree, and not in kind, from that of one having no right, but a mere color of right, to an office. The true and only foundation of the rule is, that it is essential for the protection of those who must have official business transacted, and who have neither the time nor the opportunity to investigate the title of the incumbent. Finding the office filled by one performing its duties and recognized by the public as the true officer, those having occasion for his services may trust to the facts being as the appearances indicate them to be, and in so doing will be protected. But the law affords this protection, because to refuse it would be to mislead, to their injury, persons who in good faith and upon reasonable grounds believe the person professing to be an officer to be such in fact. If he is a mere intruder, acting without color of right and without recognition by the public, no one should believe him to be an officer and deal with him as such, for no one can reasonably believe a fact to exist for which he has no reasonable grounds.

On the facts disclosed by this record, there was neither a colorable right in Hughey to the office of justice of the peace, nor previous or other performance of official functions, nor recognition of his official character by the public, or any part thereof. He was a mere usurper, and it was the fault and folly of the plaintiff to resort to him for the issuance of the writ of replevin, and on motion the same should have been quashed.

Reversed, writ of replevin quashed, and suit dismissed.

OFFICERS DE FACTO, WHO ARE, AND WHO ARE NOT: See *Oreighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143; note to *Smith v. Bondurant*, 58 Am. Rep. 440-443; note to *Hildreth v. McIntire*, 19 Am. Dec. 63-69. One who enters into an office under color of title is an officer *de facto*: *Carlisle v. Saginaw*, 84 Mich. 134; *Milford School etc. v. Powner*, 126 Ind. 528; *State v. Lewis*, 107 N. C. 967. One who is a mere intruder into an office without color of right is not an officer *de facto*: *State v. Taylor*, 108 N. C. 196; 23 Am. St. Rep. 51, and note; *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557.

BASS v. PATTERSON.

[68 MISSISSIPPI, 310.]

USURY — SALE OF GOODS ON CREDIT AT INCREASED PRICE. NOT USURIOUS WHEN. — A contract for the sale of goods on a credit of thirty days at a certain price, with a stipulation that if they are not paid for within that time the price shall be fifteen per cent additional, is not usurious. But if the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the contract will be declared usurious. In such case the jury should be permitted to determine whether the fifteen per cent was a part of the price to be paid for the goods if payment was not made within thirty days, or was interest illegally reserved on the price entered on the books at the time of the sale.

ACTION on an open account. The opinion states the case.

T. S. Ford and Robert Lowry, for the appellant.

D. M. Watkins, and Calhoon and Green, for the appellee.

COOPER, J. Patterson sued Bass on an open account, to which the defendant filed an offset in a greater amount than the claim sued on, and demanded judgment for the excess. The offset consisted of an itemized account for goods sold by the defendant to the plaintiff.

One of the items of this account was for \$33.62, and was made up of fifteen per cent on other items of the account aggregating \$224.14 for goods sold to the plaintiff, and which were not paid for by him within thirty days from the date of sales. There was evidence tending to prove that the agreement between the parties was, that Patterson was to pay for goods bought by him from Bass within thirty days, and that he was to pay fifteen per cent upon the price charged for all goods not so paid for within that time.

The court, at the instance of Patterson, charged the jury that, even though it should believe this to have been the contract between the parties, it should not, in making up its verdict, charge Patterson with the additional fifteen per cent. The question is thus sharply presented, whether such contract, if made by the parties, was usurious, and therefore illegal.

Our statute against usury declares that "the legal rate of interest on all notes, accounts, judgments, and contracts shall be six per cent per annum; but contracts may be made in writing for the payment of as great a rate as ten per cent. And if a greater rate of interest than ten per cent shall be stipulated for in any case, all interest shall be forfeited": Code 1880, sec. 1141.

This statute, it will be seen, declares simply what rate of interest shall be lawful, and the consequence of stipulating for a greater rate; it does not attempt to define what usury is, or to declare that all contracts for the payment of money at a future date are usurious when the sum agreed to be paid exceeds the value of the consideration given and legal interest thereon to the time of payment. What contracts are or are not usurious must be judicially determined according to the rules of law heretofore prevailing. It is a sufficiently accurate definition to say that usury is taking more than the law allows for the forbearance of a debt: Kent, J., in *Van Schaick v. Edwards*, 2 Johns. Cas. 364. We have accepted this definition because it is more comprehensive than either that given by Blackstone, viz., "an unlawful contract upon the loan of money, to receive the same again with exorbitant increase": 4 Bla. Com. 156; or that of Bouvier, viz., that "usury is the illegal profit which is required by the lender of a sum of money from the borrower for its use": 1 Bouv. Inst. 299; or that of Mr. Parsons and Mr. Tyler, that it is "the taking of more for the use of money than the laws allow": 3 Parsons on Contracts, 107; Tyler on Usury, 35.

Under any and all circumstances, usury must be something other than a part of the debt for the forbearance of which it is reserved.

The authorities are numerous and uniform that a seller of land or chattels may stipulate for a larger price on a credit sale than he would be willing to accept in cash, and the transaction is not rendered usurious by the fact that the credit price is in excess of the cash price and legal interest to the date of payment: *Hogg v. Ruffner*, 1 Black, 115; *Brooks v. Avery*, 4 N. Y. 225; *Cutler v. Wright*, 22 N. Y. 472; *Græme v. Adams*, 23 Gratt. 225; 14 Am. Rep. 130; *Beete v. Bidgood*, 7 Barn. & C. 453; 14 Eng. Com. L.; *Hoyer v. Edwards*, 1 Cowp. 112; *Brown v. Gardner*, 4 Lea, 145.

But when the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the transaction will be declared usurious: *Quackenbos v. Sayer*, 62 N. Y. 844; *Thompson v. Nesbit*, 2 Rich. 73; *Torrey v. Grant*, 10 Smedes & M. 89. It is, said Judge Sharkey in the case last cited, "a question of intention."

In *Hoyer v. Edwards*, 1 Cowp. 112, Lord Mansfield said: "Here it appears the whole agreement was made out first,

the price of the goods fixed, and a limited credit given; but the party considers further, that perhaps punctual payment might not be made, and provides that in that case the buyer shall pay him so much more. There is no agreement for forbearance beyond the three months; the plaintiff might have brought his action instantly, and therefore, if not paid, was at liberty to say that the buyer should pay him a greater price."

We think the court erred in refusing to permit the jury to determine whether the additional fifteen per cent was, by the contract of the parties, a real part of the price of the goods sold. If the testimony of Bass be received as true, the transaction, except in form, was not different from what it would have been if the price of the goods sold had been greater by fifteen per cent than that charged, with an agreement to give the buyer a rebate of fifteen per cent on all sums paid within thirty days. The jury should have been permitted to determine whether the fifteen per cent was a part of the price to be paid for the goods, if payment should not be made within thirty days, or was interest illegally reserved on the price entered on the books at the date of sale.

Reversed and remanded.

USURY, WHAT CONSTITUTES. — As to what contracts are usurious, see note to *Sylvester v. Swan*, 81 Am. Dec. 736-738. As to when usury exists in the sale of chattels, see note to *Davis v. Garr*, 55 Am. Dec. 393, 394, discussing sales of goods on credit.

TOWN OF KOSCIUSKO v. SLOMBERG.

[68 MISSISSIPPI, 469.]

MUNICIPAL ORDINANCE PROHIBITING SALE OF SECOND-HAND CLOTHING

VOID WHEN. — An ordinance of a town declaring it unlawful for any person to bring into, or to offer for sale therein, second-hand clothing, without having first produced satisfactory proof to the mayor that such clothing did not come from a district or locality in which contagion or infection was prevailing or had prevailed, is, in the absence of any epidemic or of other circumstances apparently rendering it necessary for the preservation of the public health, clearly an unreasonable and unjust interference with a recognized and legitimate business pursuit, in restraint of trade, and therefore void.

HABEAS CORPUS. Solomon Slomberg was convicted before the mayor of the town of Kosciusko under an ordinance of said town which is set forth in the opinion. He refused to

pay the fine imposed upon him, and sued out a writ of *habeas corpus* before the circuit judge, who discharged him from custody, upon the ground that said ordinance was void. The town appealed. Other facts are stated in the opinion.

Anderson, Haden, and Davis, for the appellant.

Allen and McCool, for the appellee.

WOODS, C. J. The charter of the town of Kosciusko confers upon the authorities of that municipality the power of establishing and enforcing quarantine and other regulations necessary to the health of the town, of making regulations to secure the general health of the inhabitants of the town and to prevent and remove nuisances, and of passing all ordinances which may be necessary to carry into effect the powers conferred.

In supposed pursuance of these charter powers, the municipal authorities adopted an ordinance declaring it unlawful for any person to bring into, or to offer for sale therein, second-hand clothing, without first having produced satisfactory proof to the mayor of the town that such clothing did not come from a district or locality in which any contagion or infection was prevailing or had prevailed.

The power to prevent the introduction of infectious and contagious diseases by appropriate regulations is not to be disputed. But to justify the sweeping and far-reaching use of the power exercised in the ordinance in the case before us, there must be, at least, some circumstances apparently rendering such exercise of this power necessary for the preservation of the health of the public. The town may quarantine, in cases demanding that extraordinary measure, in seasons of epidemic, in the interest of public health; but to justify the exercise of this power, there must be apparent necessity for so doing. In such cases, regulations unpleasantly or injuriously affecting the individual may be properly employed to accomplish the general safety. But in the absence of any epidemic apparently requiring the use of quarantine regulations and regulations restraining trade temporarily, the exercise of such power in the manner employed in the ordinance of the town of Kosciusko becomes unreasonable and oppressive.

The ordinance is in restraint of a legitimate trade, and is unequal and unjust in its terms and operation. It cannot be contended that a second-hand clothing store is a nuisance

per se, or that second-hand goods are infectious in their nature. If brought from a locality in which infectious and contagious diseases are prevailing, or have recently prevailed, such goods might properly be regarded as endangering the general safety and public health; but the same is equally true of new and unused goods. Between the new and the second-hand the difference, at the most, is a degree in danger only. Why impose the burden in the one case, and not in the other? Any why impose it in either case, where there is no pretext of apparent necessity for such interference with lawful traffic?

The ordinance is clearly an unreasonable and unjust interference with a legitimate and recognized business pursuit, and is a permanent restraint upon trade.

Affirmed.

MUNICIPAL CORPORATIONS — ORDINANCES. — Municipal ordinances regulating the sale of commodities, enacted under legislative permission, must be reasonable in their provisions, and referable to the performance of some governmental duty: *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328, and note; *Chaddock v. Day*, 75 Mich. 527; 13 Am. St. Rep. 468, and note. An ordinance prohibiting the sale of lemonade at stands on the street was held void, as unreasonable and in restraint of trade: *Barling v. West*, 29 Wis. 307; 9 Am. Rep. 576.

MUNICIPAL CORPORATIONS — INVALID ORDINANCE — HABEAS CORPUS. — A prisoner detained for the violation of an invalid municipal ordinance will be discharged on *habeas corpus*: *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640.

DEDERICK v. WOLFE.

[63 MISSISSIPPI, 800.]

SALE OF PROPERTY, TITLE TO WHICH IS RETAINED AS SECURITY, DOES NOT PRECLUDE RECOVERY OF BALANCE OF PRICE WHEN. — Where property is sold, the seller taking notes for the price, in each of which it is stipulated that the title to the property should remain in him until full payment of the notes, and that in case of default the payments previously made should be considered as payments for the use of the property, and after default in payment of the last note, the seller retakes the property and sells it, after notice to the buyer, for a sum less than the amount due him on the last note, such sale will not preclude him from recovering the balance due to him on said note, such note stipulating that it was to be paid absolutely and at all events, and without defense.

CONTRACT, CHARACTER OF, HOW DETERMINED. — In determining the real character of a contract, courts will look to its purpose, rather than to the name given to it by the parties; and if one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted.

ASSUMPSIT on a note. Dederick sold to Wolfe and wife a hay-press for \$450, taking three notes of \$150 each. Two of the notes were paid when they fell due. Default having been made in the payment of the last note, Dederick brought an action of replevin to obtain possession of the press, took the press, and after due notice to the debtors, sold the same at public outcry for twenty-five dollars, which sum, less the expenses of the sale, he credited on the note. He brought suit in the justice's court to recover the balance due on the note, and recovered judgment, from which the defendants appealed to the circuit court, where a judgment was rendered in favor of the defendants, and the plaintiff appealed to this court. Other facts appear from the opinion.

Brams and Alexander, for the appellant.

E. E. Baldwin, for the appellees.

CAMPBELL, J. By the writing sued on, the makers obligated themselves to pay the sum stipulated, absolutely and at all events, and were to have the possession and use of the article named until full payment of the price, or until deprived of it by the act of Dederick for his own security, the title remaining in him until full payment of the agreed price, and any payment made before resumption of possession should be considered as payment for use, but nothing "shall constitute a defense or offset, or delay prompt payment of this note in full at maturity." The manifest purpose of the parties was to secure the press to the buyer, and the stipulated price to the seller, and hence the transfer for use of the press, and the retention of title in the seller until paid for. The transaction was plainly a sale, with reservation of title as security for the price, and resorting to the press as means of securing payment of the note was in pursuance of the contract, and did not preclude a recovery on the note, which by its terms and the superadded stipulation was to be paid at all events, and without defense. The case of *Bailey v. Hervey*, 135 Mass. 172, relied on by counsel for the appellees, rests on the assumption that the seller was not entitled to the goods sold and full pay for them, and as he had seized the things sold and converted them to his own use, he had made an election between inconsistent things, and was bound by this election. In the case before us the seller merely resorted to the thing sold to make it available as a security for the note due and unpaid.

He did not claim the right to the press and the money too, but to make what he could by a sale of the press at a public outcry after due notice, and hold the makers of the contract to pay the balance. Dederick did not by his course elect to abandon his right to recover on the promise to pay, nor did he do anything inconsistent with a claim for the performance of that promise. The title was retained by the seller for the very purpose of being made available to the payment of the money promised, and it would be a strange result if the exercise of this undoubted right by the seller, as stipulated for by the buyer, should preclude a recovery on the promise which by its terms was to admit of no defense. It is true, it was stipulated that any payment made should be considered as "payment for use," but it was also stipulated that no "cause shall constitute a defense" of the promise to pay the money; and the proposition that Dederick, by taking possession of the press to make it available as security, surrendered or abandoned or lost his right to go for the money still due is not maintainable. It rests on the view that the contract was really a mere hiring for use, and that the seller could end it by taking possession of the press at any time, and treat any payment he had received as hire or rent, and this view would be maintainable, if regard be had to a single stipulation of the contract, but "in determining the real character of a contract courts will always look to its purpose, rather than to the name given to it by the parties": *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; and see *Haryford v. Davis*, 102 U. S. 225, in which latter case the court dealt with a contract substantially like the one before us, and took the same view of its effect as we do of this.

The cases supporting our view are numerous. Many are referred to in 3 Am. & Eng. Ency. of Law, 426. Our own are decisive in its favor: *Duke v. Shackelford*, 56 Miss. 552; *Burnley v. Tufts*, 66 Miss. 48; 14 Am. St. Rep. 540.

It would be a most unreasonable interpretation of the contract to hold that Dederick's taking possession of the press was an abandonment of his claim to be paid what had been promised and not paid. There is no express provision to that effect, and to give such effect to Dederick's act is to cause a forfeiture of his right to be paid in full, at all events, as promised by the buyer, while the other view does justice to both parties, according to their contract, by allowing the

seller what he was promised and the buyer what was purchased, and treating the press as it was intended to be, as a security for the payment of the stipulated price.

Reversed, and remanded for a new trial.

CONTRACTS, CONSTRUCTION OF. — In determining the real character of a contract, courts always look to its purposes, rather than to its name given by the parties; and though the parties denominate it a lease, the court may adjudge it a conditional sale, with a reservation of title in the seller: *Fidelity etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858. Where a written contract is capable of more than one interpretation, the court will take into consideration the subject-matter and the circumstances, for the purpose of giving the contract its intended meaning: *Railway v. Shinn*, 52 Ark. 93; *Pensacola Gas Co. v. Lotze*, 23 Fla. 368; *Huss etc. Co. v. Heinze*, 102 Mo. 245; *Knopf v. Richmond etc. R. R. Co.*, 85 Va. 769; *Colton v. Field*, 131 Ill. 398; *Ingle v. Norrington*, 126 Ind. 174; *Shafer v. Senceman*, 125 Pa. St. 310; *First Nat. Bank v. Jagger*, 41 Minn. 308.

SALES. — RETENTION OF TITLE IN THE SELLER: See *Pratt v. Burhans*, 84 Mich. 487; 22 Am. St. Rep. 703, and note; note to *Miller v. Steen*, 89 Am. Dec. 128, 129; note to *Marvin Safe Co. v. Norton*, 57 Am. Rep. 572-585; note to *Stadtfield v. Huntsman*, 37 Am. Rep. 664-668. In *Hine v. Roberts*, 48 Conn. 267, cited in the note to *Singer Mfg. Co. v. Cook*, 40 Am. Rep. 22, an organ was delivered on a written agreement for a specified rent, part of which was paid in a melodeon delivered by the buyer, and part in a note executed by him, payable in two years, "with the understanding that if I pay all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." The organ was returned, and it was held that no action could be maintained by the seller on the note.

In *Tyfts v. D'Arcambal*, 85 Mich. 185, ante, p. 79, where the seller retained title to property until it should be paid for, under a contract providing that in case of the non-payment of any of the purchase-money notes the seller might take possession of the property, without providing that the taking of possession should be deemed a rescission or work a forfeiture of payments actually made, upon a default in payment, the seller having replevied the property, the court held that such action did not entitle the buyer to rescind the contract, or to recover the payments by him made thereunder, or to a delivery of the unpaid notes. But a contrary rule seems to have been followed in *Hays v. Jordan*, 85 Ga. 741.

JAMES v. DREW.

[68 MISSISSIPPI, 512.]

GOVERNMENT SURVEYS, SHORTAGE IN, HOW APPORTIONED. — Where the government map and the original field-notes show a township and each of its sections to be full, but all the monuments between the two northern tiers of sections are lost, and the evidence shows that there is a shortage in the measurement of those two tiers, such shortage should not fall wholly on the northern tier, but should be apportioned equally between the two tiers, although the original survey must have been made by beginning in the southeast corner of the township, and working northward.

EJECTMENT. The opinion states the case.

Campbell and Starling, and Jayne and Watson, for the appellants.

Yerger and Percy, for the appellees.

WOODS, C. J. The record in the case before us presents for consideration the rights of ownership in interior and exterior sections of land in a particular township, in which, as is alleged and shown for appellees, there is a shortage, on north and south lines, of about seventeen chains. It is the case of a lost boundary between interior and exterior sections. The question is, Shall the shortage fall upon the exterior northern tier of sections? or shall it be apportioned ratably between the exterior and interior sections?—the boundary line between which, as originally established and marked out upon the ground, having been lost.

Assuming that the original corner between sections 13 and 14 on the one side and sections 23 and 24 on the other side of the line dividing middle tiers of sections of the township has been established, and that the original quarter-section corner between sections 16 and 17 has also been established, and assuming, as we are warranted in doing by all the evidence on this point on both sides, that the northern line of sections 2 and 3 (which is also the northern boundary of the township) is where placed by appellants' witnesses Murray and Fontaine, it is manifest that there is a shortage in the two upper tiers of sections, that embracing 10 and 11 and that embracing 2 and 3, of about seventeen chains.

The original survey and field-notes show the township and each of its sections to be full. It appears from the evidence that the yet remaining marks and monuments of the original survey demonstrate with reasonable certainty that the several

sections lying in the first four tiers, beginning to count from the southern line of the township, are all full sections, as shown on the original map of the survey and the field-notes. The shortage, then, is necessarily to be looked for and found in the territory in which sections 2 and 3 and 10 and 11 are situated.

We have, then, the southern boundary of 10 and 11 ascertained and known, and the northern boundary of 2 and 3 likewise ascertained and known; and we have no monuments, so far as this record discloses, by which to fix the boundary line between 2 and 3 on the one side, and 10 and 11 on the other. As to every other boundary line in the township, so far as now appears to us, there is or may be had certain knowledge. As to this vital line in the disputed territory, we grope in impenetrable darkness.

In this state of the case, what rule must govern? In every case where purchasers acquired title to lands situated as are those involved in this litigation, shown by the original survey and field-notes to be full sections, but subsequently ascertained to be fractional in some part, deficient in acreage somewhere, and the dividing boundary originally marked out on the ground is irrevocably lost, upon whom shall the shortage be placed?

The trial below was had, we think, upon the theory that the loss must fall upon the owners of the northern tier of sections. This theory must be supported by reference to the manner of the original survey and the regulations controlling such survey. The original survey must have been begun, after the running and establishment of the township lines, in the southeast corner of the township, and thence working northward in laying off full sections, and, by necessity, putting any excess or deficiency in quantity of land in the only remaining sections, viz., those constituting the northern tier. Such is the manner in which original surveys are made, and such course is consonant with reason and experience. But in the case at bar the original survey and field-notes, introduced by appellees, show all the sections full, and there was no excess or deficiency to be placed on any tier of sections. The natural monuments yet remaining show no deficiency in any of the tiers of sections south of those embracing the disputed territory. The deficiency lies in the first and second tiers on the northern border, clearly, and the original survey and field-notes have not paid any regard to it. Looked at in

this way, we do not see how the theory, based upon the manner of making the original survey, can be maintained.

The case before us is one in which the government map of the original survey and the field-notes show all the sections of the township to be full sections. It was a purchase by the owners, as we must conclude, of full sections, as they supposed and had reason to believe. After all monuments have been destroyed or lost, it appears that the original survey was erroneous, and that the original boundary cannot be established. Shall the hardship of the entire loss resulting from such shortage, under such circumstances, be borne by the owner of the northern sections? Would not the imposition of this burden be purely arbitrary and inequitable? Will we be authorized in entertaining the presumption that the shortage of the north and south line arose out of error of original survey of that particular part of the line in the extreme northern tier of sections? Rather, will not justice require us to presume that the shortage arose from error in the original survey of the whole line in the disputed territory? We feel constrained to take the latter as the true ground. If we are correct in this, reason and conscience would plainly require the shortage to be apportioned among the owners of the sections, or subdivisions of sections, ratably, lying on the line of shortage.

This general statement of our opinion is in harmony with the current of authority: See Tiedeman on Real Property, sec. 832; 2 Am. & Eng. Ency. of Law, 503; *Moreland v. Page*, 2 Iowa, 139; *Jones v. Kimble*, 19 Wis. 429.

We have carefully examined the Missouri cases holding to the contrary view, but we find nothing in them which at all tends to impair our confidence in the doctrine to which we give our assent. The case of *Overton v. Davisson*, 1 Gratt, 211, 42 Am. Dec. 544, is not, we think, necessarily in conflict with our opinion.

While no instructions were given the jury on the trial below, some of the rulings of the court on the admission of evidence violated the rule governing in cases like the present, as herein laid down.

Reversed and remanded.

SURVEYS, SHORTAGE IN, HOW APPORTIONED: See *Perels v. Magoon*, 73 Wis. 27; 23 Am. St. Rep. 389, and cases cited in note. The cases so cited, in our judgment, correctly construe the statute controlling surveys of public lands; but we know not how to reconcile with them the opinion in the principal case.

STOWERS v. POSTAL TELEGRAPH CABLE COMPANY.

[68 MISSISSIPPI, 559.]

TELEGRAPH LINE IN STREET IS ADDITIONAL SERVITUDE FOR WHICH ABUTTING OWNER MUST BE COMPENSATED. — A telegraph line along a public street is no part of the equipment of the street, but is foreign to its use, and an additional servitude. A municipal corporation cannot therefore authorize a telegraph company to construct its line along a public street, without first making compensation to an abutting owner, whether the fee in the street is in him or in the public.

BILL by Stowers to enjoin the defendant from putting up one of its posts on the sidewalk in front of his lot, without his consent and against his protest. The bill alleged that complainant was the owner of the lot to the center of the street. The answer admitted the ownership of the lot, but denied that complainant was entitled to the use of the street to its center free from obstruction. After hearing, the injunction was dissolved, and the plaintiff appealed.

Birchett and Shelton, for the appellant.

Warren Cowan, for the appellee.

COOPER, J. There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land. *Lewis on Eminent Domain*, sec. 181; citing *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Dusenbury v. Mutual Union Tel. Co.*, 11 Abb. N. C. 440; *Metropolitan etc. Tel. Co. v. Colwell Lead Co.*, 50 N. Y. Sup. Ct. 488; *Broome v. New York etc. Tel. Co.*, 42 N. J. Eq. 141; *contra*, *Hewett v. Western U. Tel. Co.*, 4 Mackey, 424; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7; *Julia Building Ass'n v. Bell Tel. Co.*, 88 Mo. 258; 57 Am. Rep. 398.

Though the question was not involved in the decision of the cause then before the court, *Arnold, C. J.*, in *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279, stated, in delivering the opinion of the court, that there was no difference in right in cases where the owner of the abutting land owned the fee to the center of the street and those in which the fee was in the public. To that declaration, and upon the authorities there cited, we now give the force of decision.

It follows that it was not competent for the city of Vicks-

burg, by the action of its municipal authorities, to authorize the erection of the telegraph wires by the telegraph company, to the injury of appellant, without having first made compensation to him for the injury inflicted upon him. The authority granted by the municipality would protect the company in its interference with the rights of the public, which is represented by the local authorities. But it cannot operate to withdraw from the appellant his right of property and confer it upon the company. That right is secured by constitutional provision, and can only be obtained by the exercise of the right of eminent domain, and upon due compensation being first made.

The decree is reversed, the injunction reinstated, and cause remanded.

HIGHWAYS — ADDITIONAL SERVITUDE — ERECTION OF TELEGRAPH LINE. — The erection of a telegraph line upon a highway is an additional servitude, for which compensation must be made to the owner of the fee: *Western U. Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908, and note. Legislative authority to telegraph companies to erect poles in public streets is subject to the liability to make compensation to the adjacent land-owners for the use: *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453. See also extended note to *McCormick v. District of Columbia*, 54 Am. Rep. 290, and *Pierce v. Dress*, 49 Am. Rep. 14-19, in which this subject is fully discussed.

MAURY v. STATE.

[88 MISSISSIPPI, 605.]

RESCUE IN RESISTING UNLAWFUL ATTACK IS NOT MURDER, NO MALICE BEING SHOWN. — Where twelve armed men, late at night, ride to the home of the defendant, by whom one of them had been beaten a few days before, call for him without having or professing to have any authority to arrest him, search the premises for him, and in doing so break open the smoke-house, and upon some one in or near the cotton-house crying out, "Here he is," advance towards that place, and the defendant, with several of his friends in hiding in the cotton-house, fire upon the attacking party, killing two of them, the crime of murder is not predicable of these facts.

INSTRUCTION INAPPLICABLE TO CASE SHOULD NOT BE GIVEN. — An instruction which has no application to the case as made by the evidence should not be given to the jury.

TIME FOR DELIBERATION OF JURY INSUFFICIENT WHEN. — Where a jury in a murder case retire for deliberation at 10:35, P. M., on Saturday night, and at 11:30, P. M., ask the court how long they have to deliberate, and are informed that the court will adjourn at 12 o'clock, whereupon they immediately return a verdict of guilty, the time given for deliberation is insufficient.

INDICTMENT for murder. The defendant was convicted of the murder of one M. H. Maury. The facts of the case are as follows: A white man named Nicholson and the defendant had a fight on the road where they met on a Thursday night, in which Nicholson was worsted. On the following Sunday night, Nicholson, with eleven or twelve of his friends, rode to defendant's farm. They rode rapidly into his yard and called for him. Not finding him, they searched the premises, and found several colored men shut up in the smoke-house, which they broke open. The defendant was not there. About that time some one in or near the cotton-house cried out, "Here is George." Some of the party then started towards the cotton-house, when a volley was fired therefrom, killing two of them, one of whom was M. H. Maury, a son of the defendant's former owner, and the other a man named Cobb, a brother-in-law of Nicholson. On the trial, several of the party testified that they went to defendant's house merely to arrest him. It was shown that Nicholson had told Cobb of the beating the defendant had given him, and that Cobb had collected the men who went to defendant's house. The defendant testified in his own behalf that he was not among those who did the shooting, having fled before it took place. The motion for a new trial alleged that the jury, after receiving its instructions, retired at 10:35 o'clock on Saturday night, and at or about 11:30 o'clock sent the officer to the judge to know how long they had in which to return a verdict, and the judge sent them word that the court would adjourn at 12 o'clock, and that the jury, immediately after receiving the message, returned the verdict. The following are the instructions referred to in the opinion: "5. Under the law of this state, any private person has a right to arrest any one who has committed a felony, and when he has reasonable grounds to suspect and believes the person proposed to be arrested to have committed the same, and this, too, with or without a warrant." "10. Even though the jury may believe from the evidence that M. H. Maury and the parties with him had no right to make any arrest of George Maury without a warrant, yet if they believe that M. H. Maury and those with him were informed by Cobb that he had a writ for the arrest of the defendant, and they so believed, and that, acting on such information, they went with Cobb, and that the defendant, or some one acting in concert with him, willfully, feloniously, and with malice

aforethought, shot M. H. Maury, from the effects of which he died, then they will find him guilty as charged." The verdict and judgment was that defendant be imprisoned for life, and he appeals *in forma pauperis*.

No counsel for the appellant.

T. M. Miller, attorney-general, for the state.

CAMPBELL, J. It is inconceivable that the crime of murder is predicable of the facts disclosed by the evidence in this case. The time and place and the circumstances of the killing forbid any such conclusion as a verdict of guilty of murder. If the killing by the accused was not justifiable, as being in self-defense, it was no more than manslaughter, unless it could be believed that it (the killing) was referable, not to resistance of the illegal arrest, but to malice, and there seems to be little ground for that. It is not claimed that the accused had committed a felony. There was no affidavit, or indictment, or warrant against him, even for a misdemeanor; and when, on that Sunday, he learned, as he must have done from its publicity, that the friends of the man with whom he had a fight the Thursday night preceeding were being collected for a nocturnal visit to his home, it was quite natural for him, and was his right, to collect his friends, and prepare to defend his home and person according to the exigency; and when twelve men, including his adversary in the fight of Thursday, armed with guns and pistols, at or after the hour of ten o'clock at night, hurriedly advanced into his yard, calling for him, but without any authority to arrest him, and not professing to have, making no announcement of what they wanted him for, and he or his friends fired into the assailing party, and killed some of them, it was not murder: Wharton on Homicide, sec. 227. The wonder is, that the jury so found, and in view of the instructions for the defendant, it is difficult to account for the verdict, except upon the assumption of misunderstanding by the jury of the law of the case, or want of sufficient time for deliberation. The fifth instruction for the state had no application to the case as made by evidence, and was probably asked and given inadvertently, for there was no hint of any felony having been committed; and it is probable that harm was done by this instruction. It is also probable that the tenth instruction for the state misled. In view of this, and the facts attending the homicide, and

the short time allowed the jury for deliberation, we are constrained to reverse the judgment, and grant a new trial.

Reversed and remanded.

CRIMINAL LAW — HOMICIDE. — Where an officer with an armed posse surprises a man by a night visit with the intent to arrest him, and he, knowing nothing of their intent, kills the officer, it is not murder, but manslaughter: *Groom v. State*, 85 Ga. 718; 21 Am. St. Rep. 179, and note; *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454, and note. Homicide is justifiable where it is committed by one whose habitation is entered in a violent and riotous manner by a party for the evident purpose, to him, of offering violence to some occupant thereof: *People v. Batchelder*, 27 Cal. 69; 35 Am. Dec. 231, and note; *Goins v. State*, 46 Ohio St. 458.

ALSUP v. BANKS.

[68 MISSISSIPPI, 664.]

LEASE IS NOT TERMINATED BY DEATH OF LESSEE WHEN. — A lease of land, the execution of which was not with reference to a business which could not be carried on without the personal presence of the lessee, is not terminated by his death, but his estate is liable for the rent during the entire term.

LESSOR MAY RE-LEASE PREMISES DEMISED, AND HOLD LESSEE'S ADMINISTRATOR FOR DEFICIT, WHEN. — Where the administrator of a deceased lessee notifies the lessor of his determination to abandon the leased premises, but the lessor objects to his doing so, and notifies him that he will re-lease the premises for the best rent he can get, and hold the lessee's estate for any deficit that may arise, there is no annulment of the lease, and the lessor may recover from the administrator the amount of such deficit.

N. M. ALSUP leased certain lands from R. M. and H. Banks for a term of five years. Towards the end of the first year of the term the lessee died. J. H. Alsup qualified as administrator of his estate. The administrator abandoned the premises under the circumstances stated in the opinion, and the lessors rented them to another person for three years at a lower rent. This suit was brought to recover the difference between the rent the lessee had agreed to pay and that for which the premises were re-leased. The administrator answered that the lessors had voluntarily canceled the contract of lease, that the lessors had taken back the premises after the death of the lessee, and that the contract was terminated by his death. The defendant made his answer a cross-petition, in which he alleged that the lessee's estate was insolvent, and asked that the complainants should be required to pay

him, for the benefit of the other creditors of the estate, the difference between their *pro rata* share of the assets of said estate according to the full amount of their claim, and what they were receiving as rents from the party to whom they had rented the land after it was surrendered by the administrator. A demurrer to the cross-petition was sustained, the case went to trial, and resulted in a decree in favor of the plaintiffs. Other facts are stated in the opinion.

St. John Waddell, for the appellant.

Perkins and Percy, for the appellees.

WOODS, J. That the demurrer to the cross-petition was properly overruled is too clear to require any remark.

Equally non-maintainable is the proposition that the contract of lease was terminated by the death of the lessee, and that no suit to enforce the same could be prosecuted against his administrator. That a contract of lease for a very valuable plantation running for a term of five years does not fall in the small class of contracts ended by the death of the lessee is perfectly clear. The execution of this contract was not with reference to a business which could not be carried on without the personal presence of the lessee. Such a thought cannot be supposed to have occurred to the parties to the contract, for the execution of it was not at all contingent upon the continued existence of the parties, or either of them.

The remaining contention on the part of appellant rests upon the proposition that there was an annulment of the lease-contract by agreement, or by implication in law from the acts of the parties and a surrender by the administrator. The facts are, that after the death of the lessee, and at the beginning of the second year of the term, the appellant signified to appellees his purpose not to carry out the contract, and to abandon and surrender up the premises, which was met by an expression of unmistakable unwillingness to that course by appellees; that soon afterwards, appellant did abandon and vacate the premises; that appellees notified him that they would hold the estate of the lessee for the rents, according to the terms of the lease, and that they would let the premises for the account of the intestate's estate, and hold it for any deficit that might arise; that appellees, after appellant's abandonment of the premises, took possession and rented the place to others, at an annual rental less by about

a thousand dollars than that agreed to be paid by the deceased lessee; that appellees did all they could to obtain the best terms in renting to others, and that the price obtained was the highest and best that could be secured.

That there was no surrender, in the sense that there was such yielding of possession of the leased premises, by mutual agreement, which worked a cancellation of the original contract, and an extinguishment of the leasehold estate, appears certain to us. There can be no reasonable inference drawn from the facts above recited tending even to show such mutual agreement and purpose. On the contrary, we have the expressed declaration of the unwillingness of appellees to that course, and their declared purpose, in the event of appellant's abandoning the premises, to let the same, and hold the lessee's estate for the difference between the sum thus obtained and that stipulated for in the lease-contract. On these facts the case seems manifestly against appellant's contention.

Nor do the facts that appellees took possession of the premises after their abandonment by appellant, and rented them on the best terms obtainable, release appellant from his liability to pay as the representative of the deceased lessee, for all these acts of appellees were in the interest and for the benefit of the lessee, equally as for the interest and benefit of the lessors. There was no taking by the lessors of possession unqualifiedly and unconditionally, and a dealing with the premises in a manner inconsistent with the continuance of the unexpired lease. True, the lessor might have permitted the premises to remain vacant and untilled, and have recovered the entire rental from the lessee or his representative; but he was not compelled to take this course. He wisely and lawfully took the other course, whereby the interests of the lessee's estate were largely subserved.

The decree of the court below conforms to these views, and must be affirmed.

LANDLORD AND TENANT — LEASE. — Where a tenant for life leases the estate for a term of years at a yearly rent, and dies before one of the rent days, the tenant may quit free of rent from the last rent day; but if he remains, the landlord may recover for his use and occupation from the lessor's death: *Hoagland v. Crum*, 113 Ill. 365; 55 Am. Rep. 424. A lease for a fixed period will not terminate until the end of that time, notwithstanding the death of the lessee: *Hihn v. Mangenberg*, 89 Cal. 268.

WILLIAMS v. STATE, USE OF FLIPPIN.

[68 MISSISSIPPI, 680.]

STATUTE OF LIMITATIONS, WHEN BEGINS TO RUN IN FAVOR OF SURETIES OF ADMINISTRATOR. — Where an administrator dies, and his administrator files an account of his intestate's administration, and a decree is made, showing a balance due the estate, in a suit by the distributees against the sureties on the bond of the first administrator, the statute of limitations begins to run from the date of the decree, and not from the death of the administrator.

DECREE ON ACCOUNTING ADMISSIBLE AGAINST SURETIES OF ADMINISTRATOR. — In a suit by distributees against the sureties on the bond of an administrator, a decree in the course of administration, fixing the amount due by him to the estate, is admissible in favor of the plaintiffs, and is *prima facie* evidence of the amount due, although such decree is rendered after his death upon an account of the administration presented by his administrator.

SUIT on a bond. Powell Flippin, referred to in the opinion, was the son of Samuel F. Flippin, and grandson of John P. Flippin. His distributive share was paid to him under the decree of September 15, 1883. Other facts are stated in the opinion.

R. Horton and A. H. Whitfield, for the appellants.

William C. McLean, for the appellees.

COOPER, J. John P. Flippin died in December, 1877, and in January, 1878, administration upon his estate was granted to Samuel F. Flippin, who qualified and gave bond with the appellants as his sureties. In November, 1878, Samuel F. Flippin died intestate, and administration upon his estate was granted to one Williams, who, as such administrator, filed the final account of his intestate as administrator of the estate of John P. Flippin. This final account as passed showed a balance of \$1,241.59 due by the deceased administrator to the estate of his intestate, and on the 15th of September, 1883, a decree was rendered thereon against the administrator of the deceased administrator for that sum. Administration *de bonis non* of the estate of John P. Flippin was granted to Mrs. Mary E. Flippin, and the estate having been finally settled, the present suit is brought by the distributees of John P. Flippin, against the sureties upon the bond of Samuel F. Flippin, to recover the amount of the said decree, less the sum of \$562.74 paid by the administrator of Samuel F. upon the same, the estate of Samuel F. having been fully administered as an insolvent estate. This suit was brought on the 11th

of September, 1888, more than six years after the death of Samuel F. Flippin, but less than six years from the date of the decree above referred to. The defendants pleaded the statute of limitations of six years after the death of the administrator, and before suit brought, in bar thereof, and the action of the court below in disallowing this plea presents the first ground of the errors assigned.

It is urged by the appellants that the death of the administrator terminated the trust for the faithful administration of which they had become bound, and that since any *devastavit* by their principal must have preceded this event, the statute of limitations then began to run, and by the lapse of the statutory period between the death of the administrator and the institution of this suit they are discharged of all liability as sureties on his bond.

To this contention on the part of the sureties it is sufficient to reply, that, though the administrator may die, the administration committed to his hands continues in the court until closed by his personal representative in the manner directed by law. The death of the administrator is not a *devastavit* of the estate, and confers no right of action either upon the administrator *de bonis non* of the original intestate or upon his distributees. It is the decree of the court having administration of the estate rendered upon the final account of the original administrator made by his administrator which fixes the liability of the deceased administrator, and from its date the statute of limitations begins to run: *Nunnery v. Day*, 64 Miss. 457; *Cooper v. Cooper*, 61 Miss. 676.

The defendants objected to the introduction in evidence against them of the decree of September 15, 1883, rendered upon the final account of Samuel F. Flippin as administrator, by his administrator Williams, on the ground that it was *res inter alios acta*, and therefore incompetent. It is conceded by counsel that since the decision of *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651, it has uniformly been held in this state that an account of the administrator in the course of administration, or a judgment or decree against him, is admissible in evidence against the sureties, and makes a *prima facie* case to be rebutted by them. The contention is, that a different rule should apply to an account rendered by the personal representative of the deceased administrator, for whom and for whose acts the sureties have not bound themselves. Counsel rely principally upon the decisions of

the supreme court of Alabama, notably that of *Martin v. Ellerbe*, 70 Ala. 334. In that state it seems to be settled that a decree in the administration of an estate rendered upon the final account of an administrator by his administrator cannot be given in evidence in a suit against the sureties on the administrator's bond, but that a decree made upon the account of the principal administrator is conclusive against his sureties. We cannot concur in the correctness of the views entertained by the Alabama court. We can perceive no well-founded distinction between one decree and the other when both are made by the court having jurisdiction of the administration, and in the course thereof.

The condition of the bond of the administrator is, that he shall "perform the duties required of him by law," which duties consist in the due administration of the estate, by the payment of debts, and the distribution of the remainder among those entitled to receive it. There is much confusion and diversity, both of argument and decision, upon the question of the competency and effect in evidence of a judgment or decree against the principal when offered against the sureties upon his administration bond. In Alabama such judgment or decree is conclusive; but a decree upon an account rendered by the administrator of the administrator is not evidence at all. In North Carolina a judgment against the administrator is not evidence at all against the sureties: *McKellar v. Borrell*, 4 Hawks, 34. In Virginia, South Carolina, Georgia, New York, and Mississippi, the argument is against the competency of the evidence, but the decisions are that it is competent, but not conclusive, evidence: *Munford v. Overseers*, 2 Rand. 315; *Craddock v. Turner*, 6 Leigh, 116; *Lyles v. Caldwell*, 3 McCord, 225; *Ordinary v. Condry*, 2 Hill (S. C.) 313; *Bryant v. Owen*, 1 Ga. 355; *Douglass v. Howland*, 24 Wend. 35; *Lipscomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651. As we have observed, we are unable to adopt the distinction of the supreme court of Alabama, by which a difference is made between the decree against the administrator on an account rendered by him and a decree rendered against the estate of such administrator upon his final account rendered by his administrator. Each is a decree in the administration of the estate; each is conclusive against the principal in the bond or his personal representative, and each is upon an account filed in the administration of the estate by the

first administrator, one being rendered by him in person and the other by his personal representative for him.

It is to be remembered that the statute provides for both accounts as a part of the lawful administration of the estate, and it is for that that the sureties have bound themselves. Their obligation is, that the administrator shall account for and pay over the estate committed to his charge. "The decree is evidence that he has been called upon and has not performed this obligation, and thus proves the breach assigned": *Lyles v. Caldwell*, 3 McCord, 225.

The appellees are not chargeable with any misapplication by the administrator of the estate of Samuel Flippin of the assets of his estate; they had no control over the same, and could not have prevented the payment to Powell Flippin, who, it is conceded, was not entitled to receive anything until the debts of Samuel should have been finally paid. But this was a mere wasting of the estate of Samuel Flippin, and for that his administrator, and not appellees, must respond.

The decree is affirmed.

EXECUTORS AND ADMINISTRATORS — LIMITATION OF ACTIONS. — Where the cause of action is to recover the balance admitted to be due by the final account, the statute of limitations begins to run in favor of the sureties on the administrator's bond from the auditing and filing of such final account: *Kennedy v. Cromwell*, 108 N. C. 1.

EXECUTORS AND ADMINISTRATORS — LIABILITY OF SURETIES. — A judgment of an orphans' court fixing executor's liability can be used to sustain a suit against the sureties on his bond: *Commonwealth v. Stub*, 11 Pa. St. 150; 51 Am. Dec. 515, and extended note.

WESTERN UNION TELEGRAPH COMPANY v. ROGERS.

[68 MISSISSIPPI, 742.]

DAMAGES FOR MENTAL SUFFERING DISCONNECTED FROM PHYSICAL INJURY NOT RECOVERABLE IN ACTION FOR NEGLIGENCE. — In an action against a telegraph company for negligent delay in delivering a message, damages cannot be recovered for mere mental suffering disconnected from physical injury, and not the result of the willful wrong of the defendant.

ACTION for negligence. The opinion states the case.

Fewell and Brahan, and W. P. and J. B. Harris, for the appellant.

Witherspoon and Witherspoon, for the appellee.

COOPER, J. A telegram was sent from Chattanooga, Tennessee, to the plaintiff, who resides in Meridian, Mississippi, informing him of the death of his brother, and the time and place at which he would be buried. If this dispatch had been seasonably delivered, the plaintiff could and would have attended the burial. By negligence of the agent of the defendant company at Meridian, it was not delivered until after the last train had left Meridian for Chattanooga by which the plaintiff could have traveled to attend the funeral services. This suit was brought to recover the damages sustained by the plaintiff by reason of the non-delivery of the message.

The facts are undisputed. They are, that the message was sent, and its transmission paid for, by the sender; that it was, by the negligence of the agent, not delivered; that the plaintiff sustained no pecuniary loss, his damages being merely nominal, unless he is entitled to recovery for the disappointment of not being informed of the death of his brother in time to attend his burial.

The court below instructed the jury that the plaintiff was entitled to recover, as compensation, damages for the mental suffering sustained by him by reason of being deprived of the privilege of attending the funeral of his brother, it being conceded that no such negligence was shown as would warrant the infliction of punitive damages. The jury returned a verdict for eight hundred dollars, and from a judgment thereon the defendant appeals.

It thus appears that the single question presented is, whether, under the circumstances named, damages for mental suffering may be recovered.

It is immaterial, in the determination of the question involved, whether the action be considered as one for the breach of the contract to transmit and deliver the message, or as an action on the case for the tort in failure to perform the duty devolved on the telegraph company under the contract. The substance and nature of the default and the consequent injury are the same in either view, and in the absence of circumstances warranting the imposition of punitive damages, the measure of damages must be the same, whatever be the form of the action.

We have given to the investigation of the question that consideration which its importance demands, and though the right of the plaintiff to recover the damages awarded in

this case finds support in the decisions of several of the states, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; but it is equally true that, until recent years, this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort, and though the damages recoverable by the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitive: *Harrison v. Swift*, 18 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; 40 Am. Rep. 275; *Thorn v. Knapp*, 42 N. Y. 475; 1 Am. Rep. 561; *Johnson v. Jenkins*, 24 N. Y. 252; *Coryell v. Colbaugh*, 1 N. J. L. 77; 1 Am. Dec. 192. So much, indeed, does the motive of the defendant enter into the question of damages that in *Johnson v. Jenkins* he was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health.

Some of the text-writers upon the subject of damages, notably Sutherland (1 Sutherland on Damages, 156), assuming that the action for breach of contract of marriage is not of an exceptional character, accept the measure of damages therein applied as appropriate in all actions for breach of contract where the losses sustained are not, by reason of the nature of the transaction, of a pecuniary nature. The authorities cited by Sutherland, other than those in actions for breach of contract of marriage, are *Hobbs v. London etc. R'y Co.*, L. R. 10 Q. B. 111; *Ward v. Smith*, 11 Price, 19; *Williams v. Vanderbilt*, 28 N. Y. 217; 84 Am. Dec. 833; and *Jones v. Steamship Cortes*, 17 Cal. 487; 79 Am. Dec. 142.

The first of these cases decides only that a passenger who, with his wife and two small children, were negligently disembarked by a railway at a point four miles from his destination, on a rainy night, might recover for the inconvenience of having to walk that distance, he being unable to secure a conveyance. In *Ward v. Smith*, the damages recovered were

for pecuniary loss. *Jones v. Steamship Cortes* was a case of willful wrong and fraud. In *Williams v. Vanderbilt*, which was an action of tort for breach of duty, the defendant had agreed to transport the plaintiff from New York to San Francisco via Nicaragua. The defendant's vessel, sailing from the Isthmus to San Francisco, was lost at sea, and he negligently omitted to supply transportation over that part of the journey. The result was, that the plaintiff was exposed to disease peculiar to the Isthmus, which he contracted, and was eventually compelled to return to New York. It was held that the plaintiff was entitled to recover for loss of time occasioned by and expenses of his sickness, the court saying: "If one of the plaintiff's limbs had been broken, through the carelessness of the agents or servants of the defendant, it is settled that he could have recovered the expenses of the sickness occasioned thereby, and for the consequent loss of time, and also compensation for the bodily pain and suffering caused by such breaking of his limb. The principle on which a recovery, in such a case, is allowed for bodily pain or suffering, loss of time, and expenses, sustains the recovery, in this case, for the plaintiff's loss of health and loss of time, and his expenses during his sickness."

It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from physical injury, furnish a substantive cause of action for which recovery may be had.

The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must, from the nature of things, be purely speculative and uncertain.

In 1881, in the case of *So Relle v. Western U. Tel. Co.*, 55 Tex. 808, 40 Am. Rep. 805, the supreme court of Texas, relying upon the authority of two previous decisions in that state (*Hays v. Houston etc. R. R. Co.*, 46 Tex. 279, and *Houston etc.*

R. F. Co. v. Randall, 50 Tex. 261), in one of which an assault and battery had been committed on a passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of Shearman and Redfield on Negligence, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by reason of which default he was not informed of her death, and failed to attend her funeral. This decision has been since overruled, upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly reaffirmed: *Gulf etc. R'y Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *Stuart v. Western U. Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *McAllen v. Western U. Tel. Co.*, 70 Tex. 243; *Western U. Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 771; *Loper v. Western U. Tel. Co.*, 70 Tex. 689; *Western U. Tel. Co. v. Simpson*, 73 Tex. 422; *Western U. Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Western U. Tel. Co. v. Feegles*, 75 Tex. 537; *Western U. Tel. Co. v. Moore*, 76 Tex. 67; 18 Am. St. Rep. 25; *Western U. Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843.

The courts of Alabama, Tennessee, Indiana, and Kentucky have followed the supreme court of Texas, relying upon the decisions above noted as authority: *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148; *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Reese v. Western U. Tel. Co.*, 123 Ind. 295; *Chapman v. Tel. Co.* (Sup. Ct. Ky., June, 1890), 30 Am. & Eng. Corp. Cas. 626.

These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other states or those of England.

In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is, that the jury may — and since it is impossible to draw the line between physical pain and mental suffering in such instances must — give damages for both.

Expressions used by the courts as argument or illustration in those cases in which damages for mental suffering are re-

coverable, because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages.

Damages for mental suffering have been very generally allowed in three classes of cases: 1. Where, by the merely negligent act of the defendant, physical injury has been sustained, and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is, that the one cannot be separated from the other; 2. In actions for breach of contract of marriage; 3. In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party.

The decisions in Texas, Tennessee, Kentucky, Indiana, and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not, in our opinion, sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case decided prior to the case of So Relle, in which in an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury.

There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the So Relle case the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered.

It has been held that fright attending an accident resulting from negligence, by which bodily injury was sustained, was properly considered by the jury in awarding damages:

Seger v. Barkhamsted, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Cooper v. Mullins*, 80 Ga. 146; 76 Am. Dec. 638; *Canning v. Williamstown*, 1 Cush. 451. But where there is no bodily injury, damages for fright should not be given: *Canning v. Williamstown*, 1 Cush. 451; *Railway Co. v. Coultas*, L. R. 18 App. C. 222; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Lynch v. Knight*, 9 H. L. Cas. 577, 598.

In *Flemington v. Smithers*, 2 Car. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings; but the claim was rejected.

We are not disposed to depart from what we consider the old and settled principles at law, nor to follow the few courts in which the new rule has been announced.

The difficulty of supplying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. "Mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone": *Lynch v. Knight*, 9 H. L. Cas. 577.

The rapid multiplication of cases of this character in the state of Texas since the case of *So Relle* indicates to some extent the field of speculative litigation opened up by that decision; the course of decision shows how difficult the subject is of control. In *So Relle's* case it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In *Gulf etc. R'y Co. v. Levy*, 59 Tex. 564, 46 Am. Rep. 278, that case was overruled in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 771, where the husband had sent a dispatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental suffering caused by the negligence

of the company in failing to deliver the message; but that, suing in right of his wife (who was not a party to the contract with the company), he might recover for her mental suffering.

It is held in that state that the telegraph company must be informed, either by the face of the message or by extraneous notice, of the relationship of the parties and the purport of the message to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate these facts: "Willie died yesterday at six o'clock; will be buried at Marshall, Sunday evening": *Western U. Tel. Co. v. Brown*, 71 Tex. 723; while the following one did: "Billie is very low; come at once": *Western U. Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25. And a distinction seems to be drawn between the negligence of failing to deliver a dispatch, which causes mental pain and suffering, and failing to deliver one, which if delivered would relieve such suffering. In *Rowell v. Western U. Tel. Co.*, 75 Tex. 26, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently, a dispatch was sent containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: "The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injury to feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation."

The manifest effect of this decision is to deny to a party injured redress for mental suffering, contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the *So Relle* case.

Kentucky, Tennessee, Indiana, and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The "intolerable litigation" invited and appearing in Texas has not yet fairly

commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it.

We prefer the safety afforded by the conservatism of the old law as we understand it to be, and are of opinion that no recovery for mental suffering can be had under the circumstances of this case: *Dorrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629; *Salina v. Trasper*, 27 Kan. 544; *West v. Western U. Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Russell v. Western U. Tel. Co.*, 3 Dak. 315; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Lynch v. Knight*, 9 H. L. Cas. 577; *Victoria R'y Com. v. Coultas*, L. R. 13 App. C. 222; *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Johnston v. Wells, Fargo, & Co.*, 6 Nev. 224; 3 Am. Rep. 245; 2 Greenl. Ev., sec. 267; Wood's Mayne on Damages, 73.

Reversed and remanded.

DAMAGES — MENTAL ANGUISH. — The jury, in assessing damages for the breach of a contract, may take into consideration the mental anguish of plaintiffs, if they suffered any mental anguish on account of the matters complained of: *Renihan v. Wright*, 125 Ind. 536; 21 Am. St. Rep. 249, and note. For a discussion of mental anguish as an element of damages, see extended note to *West v. Western U. Tel. Co.*, 7 Am. St. Rep. 534-537. Mental suffering caused by negligence and delay in delivering a telegram, not of a pecuniary nature, may constitute an element of damages, even though no physical pain or pecuniary loss is suffered: *Thompson v. Western U. Tel. Co.*, 107 N. C. 449; *Young v. Western U. Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883, and note; *Gulf etc. Tel. Co. v. Richardson*, 79 Tex. 649; *Western U. Tel. Co. v. Simpson*, 73 Tex. 422. In *Rosell v. Western U. Tel. Co.*, 75 Tex. 26, it was decided that mere continued anxiety of one who has been informed of the illness of a relative, caused by the failure of a telegraph company to deliver a message conveying information of the convalescence of such relative, does not of itself constitute a ground of recovery against the telegraph company on account of its negligence. Where personal injuries are alleged and proved by the plaintiff, both physical pain and mental anguish are elements of damage, though not alleged in the complaint: *Brown v. Hannibal etc. R'y Co.*, 99 Mo. 311; *Haniford v. Kansas City*, 103 Mo. 173; *Gulf etc. R'y Co. v. Hurley*, 74 Tex. 593; *Texas etc. R'y Co. v. Douglas*, 73 Tex. 325.

KANSAS CITY, MEMPHIS, AND BIRMINGHAM RAILROAD COMPANY v. RILEY.

[98 MISSISSIPPI, 755.]

LIABILITY OF RAILROAD COMPANY FOR EJECTING PASSENGER FROM WHOM CONDUCTOR HAS TAKEN WRONG END OF TICKET. — Where a passenger purchases a round-trip railway ticket, and the first conductor to whom it is handed, by mistake, returns to the passenger the wrong end of the ticket, and the conductor on the return trip, ignoring the passenger's explanation, refuses to accept his ticket, and ejects him for want of a proper ticket, the railway company will be liable in damages for so ejecting him.

REGULATION OF RAILWAY COMPANY MAKING TICKET ONLY EVIDENCE OF PASSENGER'S RIGHT TO TRAVEL ON TRAIN UNREASONABLE. — A passenger on a railway train holding the wrong end of a round-trip ticket, returned to him by the mistake of the company's conductor, and giving a reasonable explanation of the mistake to the conductor to whom he offers it, is entitled to be carried according to the real contract; and any regulation of the company making the ticket the only evidence of the passenger's right to travel on the train, and authorizing the conductor to disregard the passenger's explanation, is unreasonable, and cannot justify his expulsion.

ACTION for damages. The opinion states the case.

J. W. Buchanan and Wallace Pratt, for the appellant.

Blair and Stribling, for the appellee.

COOPER, J. On or about the 3d of September, 1889, the plaintiff, with her husband, purchased from the agent of appellant at Myrtle two tickets for transportation over appellant's road to Blue Springs and return, both places being stations on appellant's road.

These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passengers the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the passengers. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs, and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor

refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, and not from Blue Springs to Myrtle.

The plaintiff had not before noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was traveling how it had occurred, and insisted upon her right to be carried on the ticket. But this he declined, and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train there. The plaintiff and the conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point, as the conductor stated, the plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner, and took her by the arm to put her off the train.

At all events, the plaintiff left the train at Blue Springs with her husband, and there remained until the following day, and brings this suit for damages against the appellant. The jury awarded her damages in the sum of three hundred dollars, and from a judgment for that sum the defendant appeals.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts, and North Carolina it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor, and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed, and that he may not insist upon his right to travel on the wrong ticket or without it, when it has been taken up, and recover damages for the refusal of the carrier to permit him to do so, and that the carrier may lawfully eject him from its train, using no more force than is necessary for that purpose.

The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it is held in Georgia and Indiana that the passenger is entitled to

travel according to his real contract with the carrier, where the mistake in giving the proper ticket or in taking up a proper one held by a passenger is caused by the negligence of the servants of the carrier: *Railroad Co. v. Fize*, 11 Am. & Eng. R. R. Cas. 108.

In a more recent case in Michigan than those cited by appellant's counsel (*Hufford v. Grand Rapids etc. R. R. Co.*, 64 Mich. 634; 8 Am. St. Rep. 859), the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been canceled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous, the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff, until he found out it was not true, no matter what the ticket contained in words, figures, or other marks."

The most remarkable thing about this decision is, that it was made in the same case upon the same facts, and between the same parties, as that reported in 53 Mich. 118, in which, in an opinion delivered by Judge Cooley, it was held that, as between the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel."

There is a class of cases somewhat analogous to the present one, in which, by a uniform course of decisions so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon the train. It is held that, as a condition precedent to the exercise of this right to charge higher train rates, and to expel one refusing to pay them, a reasonable opportunity must be given by the carrier to the passenger to procure the ticket required, and that one to whom no such

opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor: *Hutchinson on Carriers*, sec. 571, and authorities in note 2; *Forces v. Alabama etc. R. R. Co.*, 63 Miss. 66; 56 Am. Rep. 801.

Without determining more upon this disputed question than is necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse, at the peril of inviting an action for damages against his principal if the statement be true.

We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle, but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is, that a passenger holding and attempting to use such ticket under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger, and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger.

We find no error in the record for which the judgment should be reversed, and it is affirmed.

RAILROAD COMPANIES—MISTAKE IN TICKET.—Where any mistake about a ticket occurs through the fault of the company's servant, such mistake is chargeable to the company, and not to the ticket-holder: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499, and note; *Indianapolis etc. R'y Co. v. Howerton*, 127 Ind. 236. If a passenger asks a conductor for a stop-over ticket, and by his mistake receives only a trip-check, the second conductor may lawfully eject him for non-payment of fare: *Yorton v. Milwaukee etc. R'y Co.*, 54 Wis. 234; 41 Am. Rep. 23.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**LIGGETT AND MYERS TOBACCO COMPANY v. REID
TOBACCO COMPANY.**

[104 MISSOURI, 53.]

TRADE-MARKS. — A person has a right to the exclusive use of marks, forms, or symbols appropriated by him for the purpose of pointing out the true origin or ownership of an article manufactured by him; but such designs cannot be used for the simple purpose of naming or describing the quality of the goods.

TRADE-MARKS — INFRINGEMENT — INJUNCTION. — One who has appropriated a trade-mark to distinguish his goods from other similar goods has a property right in it which will be protected by injunction against the infringing party. To entitle him to a perpetual injunction, the imitation need not be exact or perfect.

TRADE-MARKS — INFRINGEMENT — INJUNCTION — EVIDENCE. — To constitute an infringement of a trade-mark, so as to entitle the owner thereof to an injunction against the infringing party, it is sufficient that the imitation is such as would be likely to mislead one in the ordinary course of purchasing the goods, and lead him to suppose or believe that he was purchasing the genuine article. It is not necessary to show that any one has been in fact deceived, nor to establish intentional fraud.

Paul Bakewell, R. A. Bakewell, and Smith and Harrison, for the appellants.

M. A. Reed, and Stuart and Carkner, for the respondent.

BLACK, J. This suit was instituted in the Buchanan circuit court to enjoin the defendant from manufacturing, selling, or offering for sale plug tobacco having affixed thereto the mark of a star, or a mark resembling a star, in imitation of plaintiff's trade-mark. On final hearing of the cause, the circuit court dissolved the temporary injunction, gave judgment for

defendant, and also assessed damages on the injunction bond, and gave judgment therefor in favor of the defendant.

From the proofs and admissions made at the hearing it appears the firm of Liggett and Myers had been for many years prior to January, 1878, engaged in the manufacture and sale of plug tobacco at the city of St. Louis, in this state. The plaintiff corporation was organized under the laws of this state at the last-mentioned date, and became the successor of the firm of Liggett and Myers, and as such successor acquired the business, good-will, and trade-marks of the old firm. The firm of Liggett and Myers was the first to adopt a star as a trade-mark. It is a symbol in the form of a five-pointed star made of tin, with a circular hole cut through the center. Six of these stars are attached to each plug of tobacco. This brand manufactured by the plaintiff is well and favorably known and has a large sale throughout the United States, and it is called the "Star tobacco."

The defendant, a corporation organized under the laws of this state, began the manufacture of plug tobacco at St. Joseph in December, 1888, long after the plaintiff's trade-mark had become well known to the trade. The defendant adopted a device as a trade-mark, of which complaint is made. It is a symbol of the same size as that of the plaintiff, made of tin, with eight points slightly inclined to the right, with a hole in the center, and has the word "Buzz" dimly impressed upon the surface. It is attached to the plugs the same as the star of the plaintiff.

The defendant placed its tobacco upon the market, calling it the "Buzz-saw," at a few cents per pound less than the price at which plaintiff sold its brand "Star," and as a result there was a very great depreciation in sales made by plaintiff for five or six months. While experts in the tobacco business would readily detect the difference between the two brands, still it is apparent from an inspection of the tags that an ordinary consumer would not notice the difference. Indeed, there is a vast amount of evidence in the case showing that this "Buzz-saw" was often sold as "Star tobacco," and in many instances the consumer purchased and paid for defendant's brand, supposing and believing at the time that he got what he called for, namely, "Star tobacco."

The general principles of the law concerning trade-marks are well settled. A person has a right to the exclusive use of marks, forms, or symbols appropriated by him for the purpose

of pointing out the true origin or ownership of the article manufactured by him. The limitation upon this right is, that such designs or words may not be used for the simple purpose of naming or describing the quality of the goods,—for to permit that would be to foster a monopoly; while the great purpose of the law of trade-marks is to protect the owner in the exclusive use of his device, which distinguishes his product from other similar articles, and to protect the public against fraud and deception. Any contrivance, design, device, name, or symbol may be used as a trade-mark for the purpose of pointing out the true source and origin of the goods to which it is affixed. Under some circumstances the name of a place may be used as a trade-mark.

The law is also well settled that one who has appropriated a trade-mark to distinguish his goods from other similar goods has a property right in it,—a right that will be protected by injunction against the infringing party. To entitle the plaintiff to a perpetual injunction, the imitation need not be exact or perfect. To constitute an infringement, it will be sufficient to show that the imitation is such as would be likely to mislead one in the ordinary course of purchasing the goods, and lead him to suppose or believe that he was purchasing the genuine article. It is not necessary to show that any one has in point of fact been deceived, nor is it, at this day, necessary to show intentional fraud. The following cases and many others assert some one or all of the foregoing principles of law: *Filley v. Fassett*, 44 Mo. 168; 100 Am. Dec. 275; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *McLean v. Fleming*, 96 U. S. 245; *McCartney v. Garnhart*, 45 Mo. 593; 100 Am. Dec. 397; *Hostetter v. Vowinkle*, 1 Dill. 330; *Shaver v. Shaver*, 54 Iowa, 208; 37 Am. Rep. 194.

Applying the foregoing principles of law to the case in hand, there can be no doubt but the defendant should be perpetually enjoined from using the so-called "Buzz-saw" device. There is, it is true, some difference between that symbol and the plaintiff's star, but the difference is slight, and consists in eight instead of five points, and the eight points incline slightly to the right. At a distance of a few feet they would be readily taken to be one and the same mark. The difference is colorable only, so much so as to indicate even guilty knowledge and a deceptive purpose. Besides this, the proof is clear that consumers have been and are often deceived and

led to believe that this so-called "Buzz-saw" is genuine "Star."

The defendant's device is but an evasive effort to cover up a wrongful use of the plaintiff's trade-mark. This trade-mark has become of great value to the plaintiff by reason of its long use and the continued excellence of the article to which it is affixed, and the plaintiff is entitled to the exclusive use of it. The defendant has made no appearance in this court, and we are at a loss to know upon what ground the court refused the relief prayed for.

The judgment is reversed, and a perpetual injunction will be entered here to the full extent of the relief prayed for in the petition.

TRADE MARKS, WHAT ARE. — As to what is necessary to constitute a trade-mark, see note to *Partridge v. Menck*, 47 Am. Dec. 284-295; *Putnam N. Co. v. Dulancy*, 140 Pa. St. 205; 23 Am. St. Rep. 228, and note; *El Modello C. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537, and note; *Cigar-makers' P. Union v. Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726, and note; *Koehler v. Sanders*, 122 N. Y. 65; *Solis C. Co. v. Pozo*, 16 Col. 388.

TRADE MARKS, INFRINGEMENT OF. — As to what is an infringement of a trade-mark, see note to *Robertson v. Berry*, 33 Am. Rep. 333-339; note to *Partridge v. Menck*, 47 Am. Dec. 295-299; *El Modello C. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537, and note 545, 546; *Solis C. Co. v. Pozo*, 16 Col. 388. An intentional imitation of a trade-mark likely to deceive an ordinary purchaser will be enjoined, notwithstanding the fact that a close inspection would disclose the differences in many respects of the two trade-marks: *Sperry v. Percival M. Co.*, 81 Cal. 252. But a deliberate intention to deceive is not necessary in the infringement of a trade-mark, provided the imitation is calculated to deceive, and does really deceive, purchasers: *Kenny v. Gillett*, 70 Md. 574; *Parlett v. Guggenheimer*, 67 Md. 542; 1 Am. St. Rep. 416.

TRADE-MARKS — INJUNCTION TO RESTRAIN INFRINGEMENT. — One who has infringed the trade-mark of another may be restrained by an injunction from making use of the imitation: *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22, and note 27-30; *Keller v. B. F. Goodrich Co.*, 117 Ind. 576; 10 Am. St. Rep. 88; *El Modello C. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537.

SHORTTEL v. CITY OF ST. JOSEPH.

[104 MISSOURI. 114.]

MASTER AND SERVANT—SERVANT'S RIGHT TO RELY ON SUPERIOR KNOWLEDGE OF MASTER. — Master and servant do not stand upon equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has a right to rely upon the superior knowledge and skill of the master, and is not entirely free to act upon his own suspicions of danger.

MASTER AND SERVANT—SUPERIOR KNOWLEDGE OF MASTER—NEGLIGENCE OF SERVANT. — When the master orders the servant into a place of danger, and the latter, by obeying, is injured, he is not guilty of contributory negligence, so as to bar a recovery, except when the danger is so glaring and obvious that a reasonably prudent man would have disobeyed, and not have entered into it.

PRACTICE—INSTRUCTIONS. — CLERICAL ERRORS in instructions, readily discovered upon reading them, are not grounds for reversal.

B. R. Vineyard, for the appellant.

M. A. Reed, for the respondent.

BLACK, J. The plaintiff brought this suit to recover damages for personal injuries received while engaged in repairing a sewer. The work was done by the city engineer, who procured the material, employed the men, and superintended the work by authority of a city ordinance.

The petition alleges that after a section of the sewer had been arched over, the engineer directed plaintiff and one Murray to go under the arch and remove the supports; that the engineer assured the plaintiff and Murray that it was safe to do so; that, relying upon the assurance, they proceeded to carry out the order, and while thus engaged the arch fell in on the plaintiff; and that the injury to plaintiff was caused by the negligence of the engineer in causing the supports to be removed before the cement used in the walls had hardened.

The answer was a general denial, and contributory negligence on the part of the defendant.

According to the bill of exceptions, the plaintiff introduced evidence tending to prove all of the allegations of the petition, —that he was a day-laborer, not skilled in the work; was not aware of the danger, and that none but a skilled person would, by the use of ordinary care, have foreseen the danger. And defendant offered evidence tending to show that the danger was so obvious and apparent that any person, skilled or unskilled, could, by the exercise of ordinary care, have foreseen and avoided the danger, and that plaintiff was warned of the danger attending the undertaking.

The court, at the request of the plaintiff, instructed the jury that if they believed the engineer, "after the completion of a section of the said sewer, directed the defendant and others to remove the supports under said section, and assured them that it was perfectly safe to do so, when in point of fact it was not safe, and that the plaintiff was unskilled in the matter of safety or unsafety thereof, then the defendant is liable for any injury resulting to plaintiff therefrom, even though the plaintiff, or others in his presence, might have entertained or expressed the opinion that the removal of said supports was unsafe, if the plaintiff, in assisting in such removal, acted upon said assurance of said engineer, unless the danger was so glaring as to be apparent to the mind of an unskilled man."

The court, at the request of the defendant, gave these instructions:—

"2. Although the engineer ordered plaintiff and Murray to remove the centers, and the removal of them was dangerous and unsafe, yet if, before plaintiff proceeded to remove the same, he could, by the exercise of ordinary care and observation, under all the circumstances, have ascertained the danger attending such removal, then the plaintiff cannot recover.

"3. Although the plaintiff was ordered to remove the centers under the arch of the sewer, yet if the removal of such centers at the time and under the circumstances detailed in evidence was such an obviously dangerous and unsafe proceeding that a person of ordinary and common prudence, under all the circumstances, would have refused to remove the same, then it was the duty of plaintiff to have disobeyed such order of defendant's engineer, and he cannot recover in this case."

The proposition that the engineer was the agent and vice-principal of the defendant corporation is not controverted, and from the evidence and instructions it appears to have been conceded on the trial that it was unsafe and dangerous to remove the centers at the time they were removed, and that the plaintiff attempted to remove the centers by the order and direction of the engineer. The real question, therefore, is as to what care, if any, the defendant should have exercised when thus acting under the order of the defendant, for the engineer represented the defendant.

The master and servant do not stand upon an equal footing,

even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger.

If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it: *Keegan v. Karanaugh*, 62 Mo. 230; *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 209; 9 Am. St. Rep. 336. But these cases show that though the servant is ordered into a place of danger, still, if the danger is so obvious that a prudent person, though acting in the capacity of a servant, would not obey the order, then he will be guilty of contributory negligence which will defeat a recovery.

Now, the defendant's third instruction conforms to the principles of law just stated, so there is no valid objection to it. Indeed, the plaintiff submitted the case to the jury on the same theory, for his instructions conceded that he could not recover if "the danger was so glaring as to be apparent to the mind of an unskilled man."

The defendant's second instruction does not, it is true, in so many words, contain the proposition that, to defeat a recovery, the danger must have been so glaring as to be apparent to the mind of an unskilled person; but it does submit to the jury the question whether defendant was wanting in "ordinary care and observation, under all the circumstances." This instruction must be considered in connection with the others given at the request of plaintiff and at the request of the defendant, which are more specific, and point out the circumstances under which the plaintiff could not recover. The instructions, taken as a whole, are not objectionable.

The defendant's first instruction uses in one place the word "plaintiff" when it should be "defendant," and in another place the word "defendant" when it should be "plaintiff"; still, these are mere clerical errors, readily discovered upon reading the instructions, and constitute no ground whatever for a reversal.

Some other objections are made to the instructions, but they are equally unsubstantial.

The judgment is affirmed.

MASTER AND SERVANT — HOW FAR SERVANT MAY RELY UPON SUPERIOR KNOWLEDGE OF MASTER CONCERNING RISKS. — Subjects nearly akin to this have been exhaustively treated in the notes to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 218; *Chicago etc. R. R. Co. v. Sweet*, 92 Am. Dec. 213; and *Smith v. Peninsular Car Works*, 1 Am. St. Rep. 548. The general principles deducible therefrom may be stated to be, that it is the duty of the master to exercise reasonable and ordinary care not to expose his servant to unreasonable or extraordinary risks by putting him to work in dangerous places or with dangerous implements. He is bound to furnish the servant with reasonably safe and suitable tools, and to keep them so; and failing in this duty, he is liable to the servant injured without his fault. The servant, in entering upon the employment, assumes all risks thereof of which he has knowledge, or which, in the exercise of ordinary or reasonable care, he ought to know. Generally speaking, he only assumes what may be called "seen," obvious, and patent dangers, and does not assume latent risks. The master is bound to use reasonable care to protect him from all latent defects in machinery and appliances, either by warning him of their existence or by repairing them; and if the master knows, or in the exercise of reasonable diligence ought to know, of the danger into which the servant is ordered, or of defects in appliances which he sets his servant to work with, it is his duty to inform the servant; and his failure so to do renders him liable for any injury to the servant resulting from such failure.

A servant has the right to rely upon the superior knowledge and skill of his master in these respects, and to presume, in the absence of information to the contrary, and except as to matters within the range of his own peculiar skill, that the master will perform the duty imposed upon him of furnishing adequate and reasonably perfect implements and appliances necessary for the performance of any duty required of the servant, and will not order him into a place of danger when the servant's knowledge of the danger is not equal to his own.

One of the emergencies under which the servant is entitled to rely upon the superior skill and knowledge of the master is well illustrated by this language, used by Wagner, J., in *Gibson v. Pacific R'y Co.*, 46 Mo. 163; 2 Am. Rep. 497: "It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants and workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. Any other rule would be productive of the greatest injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not

be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer."

So in *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 5 Am. St. Rep. 834, the court said: "But the master and servant do not stand at all upon the same footing in these matters. It is the master's duty to supply safe instrumentalities for the use of his servants. He is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe; whereas the servant, in the absence of notice to the contrary, or something to put him on inquiry, has a right to assume that his master has done his duty, and to rely on his superior judgment. Of course, a servant is bound to use his senses, and cannot be heard to plead ignorance of a danger that was obvious to any one on inspection; but on the other hand, because he engages to work with or in the vicinity of machinery, he is not necessarily bound to know as much as his master ought to know as to what is or what is not safe. Again, it is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed. The mere fact that a servant knows the defects does not necessarily charge him with contributory negligence, or the assumption of risks growing out of those defects. The question is, Did he know, or ought he in the exercise of ordinary common sense and prudence to have known, the risks to which the condition of the instrumentalities has exposed him?" *Soeder v. St. Louis etc. R'y Co.*, 100 Mo. 673; 18 Am. St. Rep. 724.

The rule is laid down in *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161, 22 Am. St. Rep. 515, that the burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master, and while he is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the machinery, etc., in the absence of notice that there is something wrong in that respect, especially where the servant's duties require constant attention to other matters. The rule, in other words, is, that it is the duty of the master to search for latent defects in appliances furnished the servant to work with that would render them unsafe, and the servant may presume that this duty has been performed, and act upon such presumption without being guilty of negligence, as he is only required to notice such defects as are patent to ordinary observation: *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230. In this case the court said: "A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery, unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks that are patent to ordinary observation; he has a right to rely upon the judgment and discretion of his

master, and that he will fully perform his duty toward him." The rule thus laid down is well supported by authority: *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. Winona etc. R. R. Co.*, 27 Minn. 137; *Reber v. Tower*, 11 Mo. App. 199; *Bogenschutz v. Smith*, 84 Ky. 330; *Krans v. Long Island R'y Co.*, 123 N. Y. 1; 20 Am. St. Rep. 716; *Russell v. Minneapolis etc. R'y Co.*, 32 Minn. 230; *United States etc. Co. v. Wilder*, 116 Ill. 100; *Jenney Electric Light etc. Co. v. Murphy*, 115 Ind. 566; *Behm v. Armour*, 58 Wis. 1; *Anderson v. Minnesota etc. R. R. Co.*, 39 Minn. 523.

When the risk is perfectly obvious to the sense of any man, whether servant or master, the servant assumes the risk, and cannot recover if injured: *Keegan v. Kavanaugh*, 62 Mo. 230; *Galveston etc. R'y Co. v. Lempe*, 59 Tex. 19. In other words, when the defect is alike open to the observation and within the comprehension of employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to the latter: *Jenney Electric Light etc. Co. v. Murphy*, 115 Ind. 566. The servant's right to recover, however, is not barred by mere knowledge of defects whereby injury results to him, unless he also has knowledge that such defects are dangerous. He is only bound to see patent defects, not latent ones. He has a right to rely upon his employer's care, superior knowledge, and judgment, and may assume that the latter has taken all reasonable precautions to guard him from danger, and not expose him to unnecessary risk. So the master is bound to guard him against danger which the master has created, and when such danger is not known or believed in by him, more knowledge or better judgment is not required by the servant: *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256. Where the master, or superior, orders an inferior into a situation of danger, and he obeys and is injured, the law will not charge him with the assumption of the risk, unless the danger was so glaring that no prudent would have entered into it: *Miller v. Union Pac. R'y Co.*, 12 Fed. Rep. 600; 4 McCrary, 115.

The servant is not bound, however, under all circumstances and at all hazards, to obey the order of his master or superior, and he cannot recover for injury received while obeying the order if he had time to deliberate, and voluntarily, with knowledge of the danger, placed himself in a position where the risk of being injured is great: *McDermott v. Hannibal etc. R'y Co.*, 87 Mo. 285; *Cornwall v. Charlotte etc. R. R. Co.*, 97 N. C. 11. The rule is thus stated in *Cook v. St. Paul etc. R'y Co.*, 34 Minn. 45: "While the servant assumes the ordinary, obvious risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in that respect, so that when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence, or with the assumption of the risks of so doing. This proposition is, however, subject to the qualification that he must not rashly and deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates."

If a master orders his servant to do dangerous work, and to obey the order at the time and under the circumstances is extrahazardous, but does not plainly imperil the servant's life or limb, and he, in obeying the order, is injured without his fault, he is entitled to damages. In such case the servant cannot be deprived of his remedy against the master on the ground of con-

tributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even where, like a servant, he was not entirely free to choose. The reason given for the rule is, that in such case the master and servant are not on equal footing, even though they have equal knowledge of the danger; for it is the primary duty of the servant to obey orders, even though dangerous; and it does not follow because the latter could justify disobedience to an order that he is guilty of negligence in obeying it; and the servant is not bound, at the peril of being discharged, to set up his judgment against that of his master about obeying orders, or about things over which there can be a difference of opinion in the minds of reasonable men: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336; 86 Mo. 221.

A servant cannot recover for the negligence of his superior servant if, being ordered to do dangerous work, and being aware of the danger which the superior did not apprehend, he did not seek to save himself from injury, and the fact that he was ordered to continue work would not justify him in continuing work, in the face of a danger which was glaringly apparent to him; still, where a peculiar risk commanded by the master or a superior servant is not obvious, the inferior servant has a right to assume, without investigation, that he will not be put in peril. He need not set up his own judgment against that of his superiors, but may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. So where the master directs the servant to do some dangerous work, which could be made safe by special care on the part of the former, the servant has a right to assume that such special care will be taken; and failing to exercise such care, the master is liable: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180. Whenever the master has superior knowledge or better means of observation of the danger into which the servant is ordered, and the servant is not informed of the danger, he is not guilty of contributory negligence in obeying the order: *Haley v. Case*, 142 Mass. 316; *Hawkins v. Johnson*, 105 Ind. 29; 55 Am. Rep. 169; *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88. The duty rests upon the master to warn the servant of all latent and hidden defects or hazards incident to the employment of which the master knows or ought to know, and the servant has a right to rely upon this being done; and although the master is not required to explain patent dangers to servants of mature capacity and knowledge, still, the youth, inexperience, ignorance, or want of capacity of the servant may cast the duty upon the master of warning the servant as to dangers which might be open to ordinary observation. Such servants have a right to assume that they will be so instructed; and if the master exposes a servant of such character, even with his own consent, to such dangers without first cautioning and instructing him so that he may be able to comprehend such dangers, and do the work safely, the master will be liable if injury result to such servant: *Jones v. Florence Min. Co.*, 66 Wis. 268; 57 Am. Rep. 269; *Louisville etc. R'y Co. v. Frawley*, 110 Ind. 18; *Brasil Block Coal Co. v. Gaffney*, 119 Ind. 455; 12 Am. St. Rep. 422, and cases cited; *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; 15 Am. St. Rep. 596; *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542, and note 549, 550.

EX PARTE MITCHELL.

[104 MISSOURI, 121.]

HABEAS CORPUS. — One convicted of selling intoxicating liquors in violation of a local-option law will not be discharged on *habeas corpus* on the ground that such law was not legally adopted, when that is a question for the determination of the trial court, and reviewable by an appeal.

HABEAS CORPUS WILL NOT LIE TO CORRECT ERRORS of trial courts, and cannot be substituted for appeals and writs of error.

George H. Harrison and H. J. Drummond, for the petitioner.

John M. Wood, attorney-general, for the respondent.

GANTT, P. J. This is an application by the petitioner, Christian Mitchell, for release on a writ of *habeas corpus* from the common jail of Marion County.

He avers that he is illegally restrained by the sheriff of said county, in this, that in November, 1889, he was indicted by a grand jury of said county for selling intoxicating liquors therein, contrary to the provisions of what is known as the local-option law of Missouri; and that on the eleventh day of November, 1890, he was tried in the circuit court of said county and found guilty thereof, and his punishment fixed and assessed at a fine of six hundred dollars, and a judgment for that amount was rendered against petitioner, and it was further adjudged that if petitioner did not pay said fine, he should be committed to the common jail of said county until it was paid, together with the costs.

He further alleges that he did not pay said fine, and by reason of his default, a *capias* execution was issued by the clerk of the circuit court of said county on the twenty-second day of December, 1890, to the sheriff of said county, who by authority thereof arrested petitioner, and has ever since confined him in said county jail.

The illegality complained of is, that said local-option law had not been adopted in said county, and therefore his imprisonment for violation thereof was illegal.

The return to the writ shows a *capias* execution in due form, and that the officer is holding defendant to satisfy the same, in accordance with the judgment and sentence of the circuit court of Marion County.

By section 5376 of the Revised Statutes of Missouri, 1889, it is made the duty of the court before whom a prisoner is brought on a writ of *habeas corpus* to forthwith remand the

prisoner, if it shall appear that he is detained "by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree."

It appears by petitioner's own statement that he was indicted and convicted in a court of general criminal jurisdiction for Marion County. That court had jurisdiction to determine whether the county of Marion had adopted the law commonly known as the local option law, being an act to provide for the preventing of the evils of intemperance by local option in any county in this state: Acts 1887, p. 179. The act its itself has been decided to be constitutional by this court in *State ex rel. Maggard v. Pond*, 93 Me. 605.

If defendant claimed the evidence showed this act had not been adopted, and that the circuit court erred in holding it had been, he ought to have saved the evidence in a bill of exceptions, and brought his case here by appeal.

The writ of *habeas corpus* is not the remedy to correct error of trial courts, and cannot be substituted for appeals and writs of error. Every suggestion made in behalf of the prisoner here could have been made in the circuit court of Marion County, and that court should have had an opportunity of passing upon these questions.

This court has a sufficient docket without reaching out and assuming the jurisdiction committed by the law to other courts. The prisoner will be remanded, and the writ dismissed.

HABEAS CORPUS — ERRORS OF TRIAL COURT NOT REVIEWABLE ON. — Mere errors of the trial court are not reviewable on *habeas corpus*: *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174, and note; *In the Matter of Parks*, 81 Mich. 240; *In re Ellis*, 79 Mich. 322; *Daniel v. Towers*, 79 Ga. 785; *Wright v. Wright*, 74 Wis. 440; *Ex parte Smith*, 89 Cal. 79; *Ex parte Bowen*, 25 Fla. 215; *In re McCutcheon*, 10 Mont. 115; *Ex parte Walpole*, 85 Cal. 262; *In re Thompson*, 9 Mont. 331; see also extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 40.

SNEATHEN v. SNEATHEN.

[104 MISSOURI, 201.]

MARRIAGE AFTER SUPPOSED DEATH OF HUSBAND. — Where a woman, acting upon reliable information that her former husband is dead, marries again, the marriage is legal, in the absence of evidence that the former husband is alive; especially is this so after the lapse of many years.

DEED EXECUTED BY AGED AND INFIRM GRANTOR. — A deed executed by a grantor seventy-eight years old, able to attend to his ordinary business affairs, is not presumably made under the influence of fraud, compulsion, and undue influence, although he may be physically infirm and weakened mentally.

EQUITY — CLOUD ON TITLE. — Parties not in possession, and without remedy at law, may maintain a suit in equity to remove a cloud from the title to land.

EQUITABLE JURISDICTION TO REMOVE CLOUD ON TITLE is preventive as well as remedial.

DELIVERY OF DEED DURING LIFETIME OF GRANTOR is an essential element of a valid transfer of the title to real estate, because a deed cannot be made to perform the functions of a will, but the delivery need not be made to the grantee in person.

DEEDS — DELIVERY BY THIRD PERSON. — A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person so delivered, is valid, though the grantor is dead at the date of the last delivery. In such case it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect as a present transfer. Such intent may be manifested by acts or words, or by both.

DEED — DELIVERY BY THIRD PARTY. — The rule that a grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it. It is sufficient that the deed is delivered to a third person for the grantee without reservation, and with intention that it shall take effect and from that time operate as a transfer of the title.

DEEDS — DELIVERY BY THIRD PARTY. — **WIFE OF GRANTOR** may be the third party to whom the grantor delivers the deed for the grantee.

DEEDS — INFANT GRANTEE — PRESUMPTION. — When the grantee in a deed is an infant, the law presumes assent on his part to the beneficial conveyance; and knowledge thereof and of its delivery are not essential.

Emuel G. Loring, for the appellants.

Stephen S. Brown, for the respondents.

BLACK, J. William Sneathen died on April 25, 1881. Prior thereto, and on March 24, 1881, he and his wife, Perdilla, executed a deed purporting to convey the home place, consisting of 120 acres of land, to Malcom Anderson, Emory Anderson, and William Anderson, who are the grandchildren of William Sneathen by his first marriage, the grantors reserving in the deed a life estate to themselves. The plaintiffs in this case are also children and grandchildren

of William Sneathen by his first marriage, and by this suit they seek to set aside that deed.

The substantial averments of the petition are, that though Perdilla was the lawful wife of one Moore, yet she and William Sneathen lived and cohabitated together from 1860 to his death; that she, by the use of fraud and threats and undue influence, persuaded and compelled him to make the deed; that he failed to deliver the deed during his lifetime, and after his death she procured and delivered the same to the grantees therein named.

1. The evidence shows that William and Perdilla were married in 1860. She then supposed her former husband was dead, but hearing that he was still living, she commenced proceedings for divorce, pending which she received reliable information that he was dead. The divorce proceedings were then dismissed, and she and Sneathen were again married. With this evidence, and it is all there is upon the subject, it must be held that she was the lawful wife of Sneathen for many years prior to his death.

2. The evidence bearing upon the question of fraud, compulsion, and undue influence shows that this and other deeds made by the deceased at the same time cut off plaintiffs from any portion of their father's real estate. He was seventy-eight years old when the deeds were made. While age had brought about physical infirmities, and to some extent weakened his mental capacity, still he rode about his farm, looked after his stock, and could and did attend to his ordinary business affairs. There is no reliable evidence of compulsion or fraud on the part of the wife. It is sufficient to say that the issue of fraud, compulsion, and undue influence tendered by the plaintiffs stands unproved. On the contrary, it is disproved by all the trustworthy evidence in the case.

3. The defendants insist that this is a suit to remove a cloud from the plaintiffs' alleged title as heirs, and that the suit cannot be maintained, because the plaintiffs are not in possession; and in support of these propositions we are cited to *Davis v. Sloan*, 95 Mo. 552, and *Graves v. Ewart*, 99 Mo. 18. If those cases are examined with any degree of care, it will be seen that a suit in equity to remove a cloud from a title may be maintained in those cases where the plaintiffs have no adequate remedy at law. So in *Keane v. Kynes*, 66 Mo. 216, the plaintiff had a remedy at law. Although the plaintiffs are not in possession, still, if they have no remedy

at law, a court of equity will entertain a bill to remove the cloud: Story's Eq. Jur., 12th ed., sec. 700, note 4; Pomeroy's Eq. Jur., sec. 1399, note 4.

The property in question was the homestead of the deceased, and the widow, who is a defendant in this case, has a homestead right therein, though the deed is invalid, and this right is exclusive in her, since the children are all adults. Besides this, the widow has the right to remain in possession of the mansion-house and plantation thereto belonging, until dower is assigned to her, and that has not been done in this case. For these reasons the plaintiffs cannot recover in ejectment, even if the deed should be held to be of no validity, and they therefore have no remedy at law.

The jurisdiction in equity to remove a cloud is not only remedial, but it is also preventive. It is right and proper that the question as to the validity of the deed should be determined while the evidence is at hand; and if it is invalid, it should be so declared, so as to prevent distant vexatious litigation: Story's Eq. Jur., 12th ed., sec. 700; *Gardner v. Terry*, 99 Mo. 523.

4. The real question in this case is that concerning the alleged non-delivery of the deed. The evidence bearing upon this issue is, in substance, this: William Sneathen owned and resided upon the 120 acres of land now in question, and he also owned another forty-acre tract. His wife, Perdilla, owned another forty acres, and also a one-fifth interest in her deceased father's estate. Sneathen went to a justice of the peace and requested him to prepare four deeds, at the same time explaining the reason why he desired to execute them. There was no haste in the matter, and in about four weeks thereafter the justice prepared the deeds and took them to the Sneathen residence, as requested, where they were all executed and acknowledged at the same time, on March 24, 1881.

Besides the deed in question, Sneathen and his wife executed another, conveying to Jennie Brown the forty-acre tract owned by Mr. Sneathen. Jennie Brown was a married daughter of Mrs. Sneathen by her first marriage. This deed also reserved to the grantors a life estate. The other two were deeds of quitclaim, releasing to Mrs. Sneathen the forty acres owned by her, and her interest in her father's estate. The justice testified: "After the deeds were made, Mr. Sneathen asked me who should pay for the recording. I re-

plied it was customary for those receiving them to pay for the recording. He then started for the press with them; then he said: 'What shall I do with them?' Before I had time to answer, he turned to Mrs. Sneathen and said: 'Here are your deeds; and give the others their deeds the first time you see them.' She took the deeds and put them away, with the remark that she would give them the deeds the first time she saw them."

The evidence of Mrs. Sneathen is in these words: "After he had executed the Anderson deed, he handed the deed to me, and told me to put it away and give it to Malcom Anderson, or his brothers, the grantees therein, the first time they came up. And the first time I saw them I gave it to them. I placed the deed away in a trunk with his other papers. After I had put the deed away he never called for it, and it remained uninterruptedly in that place until I gave it to them."

And Malcom Anderson, one of the grantees, says: "On Sunday that my grandfather was buried, and after the burial, I saw this deed; had not seen it before; the deed was handed me by Mrs. Perdilla Sneathen. I took it home with me; Mrs. Sneathen was lying on the bed, at her house, and the deed was on the bed at her side. She handed it to me and said: 'Now, all I want is my life estate.'"

There is other evidence to the effect that after the death of Mr. Sneathen, and on the day of the funeral, Mrs. Sneathen requested Jennie Brown to get the deed out of a little trunk; that she got it and gave it to Mrs. Sneathen, who gave it to William Anderson, the father of the grantees; that he examined it and gave it back to Mrs. Sneathen, who then handed it to Malcom Anderson, one of the grantees, and he caused it to be recorded. It appears the deed to Jennie Brown was placed in her possession shortly after its execution. Her husband testified that he went to Stewartsville, where the Anderson boys resided with their father, with Mr. Sneathen, after these deeds had been executed, and on that trip Sneathen said "he wished he had got the deed to the Anderson boys and brought it down with him and given it to them." While at Stewartsville Sneathen inquired for Malcom, saying he wanted to see him, but Malcom was not at home. The record shows that two of the boys, namely, Emory and William, defended this suit by guardian, so they must have been

minors when the deed was executed, and we infer that Malcom was also a minor at that date.

Delivery of a deed is, of course, an essential element of a valid transfer of title to real estate, and it must take place during the life of the grantor; for a deed cannot be made to perform the functions of a will. But the delivery need not be to the grantee in person. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. In such cases it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass the title as a present transfer. This intention may be manifested by acts or by words, or by both words and acts: *Burke v. Adams*, 80 Mo. 506; 50 Am. Rep. 150; *Standiford v. Standiford*, 97 Mo. 231; Tiedeman on Real Property, sec. 814. We do not consider, in the foregoing propositions, those cases where the deed is placed in escrow, for there is no evidence of an escrow in this case.

Now, when the deed in question and the one to Jennie Brown were executed and acknowledged, Sneathen gave them to his wife, with directions to put them away and give them to the grantees the first time she saw them. There were no conditions whatever attached to this delivery to her. He parted with them without any reservation. The evidence shows, too, that he had determined to convey all of his real estate to these grantees, and that all of the deeds were executed and acknowledged pursuant to that formed and expressed design. The fact that these two deeds reserved a life estate to the grantor and his wife is evidence that he intended they should take effect as conveyances before his death. It is true that Mrs. Sneathen placed the deed in a trunk with the grantor's other papers, where he could repossess himself of them if he desired to do so. But the rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure possession of it. It is sufficient that the deed is delivered to the third person for the grantee without reservation, and with the intention that it shall take effect and from that time operate as a transfer of the title.

Cases are not wanting where a delivery has been held to be

good though the grantor retained possession of the document. The intention is the important element, and, as we have said, that may be manifested by acts or words, or both. The circumstance that Sneathen, on the trip to Stewartsville expressed to Mr. Brown a regret that he had not brought the deed with him and given it to the boys does not tend to show that there had not been a delivery to his wife for them, but rather tends to show that he regarded the transfer of the title to them as a fixed fact. The circumstances under which the deed was made and the directions given by Sneathen when he handed it to Mrs. Sneathen show quite conclusively that he then parted with all control over it, and intended that it should operate as a present transfer of the title to the land.

No suggestion is made, nor do we see any reason, why the wife of the grantor may not be the third person, within the rules before stated, to whom the deed is delivered for the grantees.

The evidence shows beyond all doubt that the Anderson boys, the grantees, knew nothing of the deed until after the death of their grandfather, the grantor; but this fact does not affect the result, for they were minors, and the deed was manifestly to their advantage. When the grantees are infants, the law presumes assent on their part to a beneficial conveyance, and knowledge of the conveyance and delivery is not essential: *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392; *Standiford v. Standiford*, 97 Mo. 231; Tiedeman on Real Property, sec. 814.

There is nothing in the cases of *Huey v. Huey*, 65 Mo. 689, and *Hammerslough v. Cheatham*, 84 Mo. 13, to which we are cited by the defendants in error, which is in conflict with what has been said. Indeed, the principles of law asserted in those cases, so far as they are applicable to this case, are in accord with the rules of law here declared. It appears the circuit court decided this case on the theory that there had been no delivery of the deed in question, and in this ruling the court erred. As the court erred in this respect, and as the decree cannot be supported on any or all of the other allegations in the petition, the judgment is reversed, and the petition dismissed for want of equity.

MARRIAGE AND DIVORCE. — A presumption of the death of a prior husband will be indulged, to sustain a second marriage: *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105, and note. Where a person whose husband or wife has been absent for five years, without being known to such

person to be living during that time, marries, such marriage is valid, though the other husband or wife be living: *Charles v. Charles*, 41 Minn. 201; *Price v. Price*, 124 N. Y. 589.

EQUITY — CLOUD ON TITLE. — An action to remove cloud upon title will lie by one out of possession against one in the actual possession of the land: *Bausman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661; *Paaton v. Valley etc. Co.*, 67 Miss. 96. A suit to remove a cloud from title cannot be maintained, unless the plaintiff is in possession of the land or it is unoccupied: *Wetherell v. Eberle*, 123 Ill. 666; 5 Am. St. Rep. 574; *Johnson v. Huling*, 127 Ill. 14; *Gloss v. Randolph*, 133 Ill. 197.

EQUITY — CLOUD ON TITLE — REMEDY PREVENTIVE AS WELL AS REMEDIAL. — Equity will interfere to prevent a cloud from being cast upon title, upon the same principle that it will remove a cloud from title: *Tucker v. Kenniston*, 47 N. H. 267; 93 Am. Dec. 425, and note. See also extended note, on this subject, to *Pettit v. Shepherd*, 28 Am. Dec. 441.

DEEDS — MENTAL CAPACITY TO EXECUTE — DEEDS OF AGED AND INFIRM PERSONS. — The test of mental capacity to execute a deed is, whether the person executing it understood in a reasonable manner the nature of the act he is engaged in: *Wilkinson v. Sherman*, 45 N. J. L. 413; *Boyer v. Berryman*, 123 Ind. 451. Old age of a vendor will not alone avoid a deed, in the absence of fraud on the part of the vendee: *Beville v. Jones*, 74 Tex. 148; *Giles v. Hodge*, 74 Wis. 361; *Moss v. Moss*, 78 Iowa, 645.

DEEDS — DELIVERY — NECESSITY OF, DURING LIFETIME OF GRANTOR. — The present and future dominion over a deed must pass from the grantor during his lifetime: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; *Fair v. Smith*, 14 Or. 82; 58 Am. Rep. 281, and extended note; note to *Cassiday v. McKenzie*, 39 Am. Dec. 84; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35, and extended note. There can be no valid delivery of a deed after the grantor's death: *McElroy v. Hiner*, 133 Ill. 156; *Anderson v. Anderson*, 126 Ind. 62; *Weisinger v. Cock*, 67 Miss. 511; 19 Am. St. Rep. 320.

DEEDS — DELIVERY TO THIRD PERSON. — A deed is sufficiently delivered where it is given to a third party merely to keep and record after grantor's death, where the manifest intent was that it should take effect immediately: *Hinson v. Bailey*, 73 Iowa, 544; 5 Am. St. Rep. 700, and note; *McElroy v. Hiner*, 133 Ill. 156.

DEEDS — INFANT GRANTEE — PRESUMPTION OF ASSENT. — The assent of a grantee to a deed need not be shown, if he is not sui juris: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68.

RODDY v. MISSOURI PACIFIC RAILWAY COMPANY.

[104 MISSOURI, 234.]

ACTIONABLE NEGLIGENCE CONSISTS in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby.

NEGLIGENCE — BREACH OF CONTRACT.— **THIRD PERSON** cannot maintain an action for injuries resulting from a breach of a contract between two other contracting parties.

NEGLIGENCE.— **CAR WITH DEFECTIVE BRAKES** is not an imminently dangerous instrument, so as to render a railway company liable to the servant of another, in the absence of some relation between the servant and the company, arising out of contract or otherwise.

NEGLIGENCE — INJURY TO THIRD PERSON — BREACH OF CONTRACT.— Under a contract between a railway company and a stone-quarry owner, by which the former is to furnish the latter with cars on his own side-track, the former is bound to furnish cars which are reasonably safe for the use of the quarry-owner and his servants. But it is not liable to such servants, not parties to the contract, and over whom it has no control, for injuries received on such side-track, and resulting from its breach of contract with the quarry-owner in furnishing him with a car with defective brakes.

NEGLIGENCE — INDEPENDENT CONTRACTOR.— An employer is not responsible for the negligence of the contractor or his servants, when the contractor is given entire freedom in the use of means to accomplish the result; but when the employer reserves the right in any particular to direct the manner of the performance of the work, or undertakes to provide any of the instrumentalities, he owes the contractor and his servants the duty of care in respect to those matters over which he retains control, and those duties which he undertakes to perform.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.— In a case involving contributory negligence, if upon all the facts and circumstances fair and sensible men may differ in their conclusions, the question should be left to the jury, even though there is no dispute as to the facts.

CONTRIBUTORY NEGLIGENCE.— **USE OF DEFECTIVE INSTRUMENTALITIES.**— Though one person owes another the duty of furnishing him with reasonably safe instrumentalities for his use, yet if the latter, knowing, either from information, observation, or any other source, that those furnished are defective and dangerous, continues to use them without any promise that they will be repaired, he assumes the risk of injury therefrom, and in case of injury, is guilty of contributory negligence, which will defeat a recovery.

Adams and Buckner, for the appellant.

Samuel P. Sparks, for the respondent.

MACFARLANE, J. This is an action for damages on account of serious personal injuries received by plaintiff by reason of alleged negligence on the part of defendant in furnishing a defective car which plaintiff was required to handle.

The petition charges and the evidence shows that the main line of defendant's road, between St. Louis and Kansas City, passes through the town of Warrensburg, in Johnson County; that about three miles northwest of the town of Warrensburg are extensive stone quarries, owned and operated by one Pickle. Defendant owns and operates a branch railroad running out from Warrensburg to these quarries, which is used for transporting the stone taken from the quarries. From this branch road, at a point near the quarry, was a switch which connected the road with another railroad track running into the quarry. This latter track was owned by Pickle, and was used for loading stone upon the cars. Cars intended for transportation of coal were brought out on this branch road, and were left standing on this quarry-track, or convenient thereto, by defendant, and were then handled by Pickle until loaded, when they were carried out by defendant.

Plaintiff, at the time of his injury, was in the employ of Pickle, working in the quarry, and had been so employed for about thirteen years. At the time of his injury a part of his duty was to load stone into the cars by means of a derrick erected near the quarry and quarry-track. After the empty cars had been placed on the quarry-track they were managed, controlled, and when necessary moved to proper position for loading by Pickle and the men in his employ. This duty of moving cars frequently devolved upon plaintiff. The grade to the quarry from the branch road was descending, and brakes were required to hold cars in position.

The plaintiff testified, in substance, that on the eighteenth day of June, Antoine Pickle, manager of the quarry, directed him to load a car with stone. Two flat-cars stood upon the quarry-track, fifty or sixty feet from the derrick. He got upon the north car, nearest the derrick, and found the brakes set. He walked on top of the cars to the back end of the south car, and, as he supposed, set the brake tight on that one. He then uncoupled the cars, let the brake off the north one, sat on the end of the other, and with his feet put the north car in motion. He then got down on the ground between the cars, and with his hands, one on the draw-head and the other on the end of the car, commenced pushing the car to the derrick. He had moved but a short distance when the south car struck him, crushing his arm and causing permanent injury. It appeared from other evidence that while the brake, from what could be seen from the top of the car,

and from what could be known from turning it, appeared to be in good condition, it was found that the rod connecting the brakes beneath the car was down, and the brake-shoe was in consequence too low to touch the wheel, and turning the brakes in the usual way did not set the shoe against the wheel. The brake was, in that condition, wholly useless. When the first car was moved out of the way, the second was set in motion by its own weight, and followed the first on the descending grade, and struck plaintiff as stated.

The evidence showed further that the defect in this break could have been easily detected by an examination beneath the car. Cars were frequently sent out with defective brakes. Plaintiff testified himself that "half the time they had no brakes on them." Pickle kept chains which were used in making temporary repairs of the brakes, and this one could have been easily repaired with such a chain. The superintendent of the quarry usually examined the cars and notified the employees if any were defective.

The contract between Pickle and the railroad company, if in writing, was not offered in evidence. From the testimony of Pickle, the superintendent, the arrangement between them was, that defendant should furnish cars at the quarry when requested. The cars were left on the track, near the quarry, and were handled at the quarry and loaded by the men employed and paid by Pickle. Defendant had no control over Pickle's men. After the cars were loaded they were billed from the quarry to their destination, and charges for transportation were paid from the quarry. Defendant, when notified, received at the quarry and carried off the loaded cars.

Defendant's answer was a general denial, and plea of contributory negligence. Defendant offered no evidence, and asked no instructions, except in the nature of a demurrer to the evidence, which was refused.

At the request of plaintiff the court gave the jury the following instructions:—

"1. The court instructs the jury that if you should find and believe from all the evidence in the case that at the time of the injury complained of by plaintiff he was engaged at work in the employment of one Pickle and in his interest, and that defendant had furnished cars to said Pickle to be loaded by him with stone belonging to said Pickle for transportation by the defendant over its road for pay, on or about

the 18th of June, 1886; that of the cars so furnished by defendant there was one the brake of which needed repairing at the time the same was furnished, and for the want of such repairing was insufficient, with proper use and management, to fasten, manage, and control said car; and that defendant knew of the condition of the brake, or by the exercise of reasonable diligence could have known of its condition; and that plaintiff did not know the condition of said brake until the happening of the injury complained of, and the defect in said brake was not patent to plaintiff, or such as would have been disclosed to him had he been ordinarily observant; and that plaintiff, while so engaged in the service of said Pickle, loading another of defendant's cars, the car to which was fixed the brake, being out of repair, ran down and against plaintiff, whereby he was hurt, injured, and damaged; and that the injury occurred without the fault or negligence of plaintiff contributing thereto, — then your findings should be for plaintiff.

"2. The court instructs the jury that if you should find and believe from all the evidence in the case that the defendant furnished cars to said Pickle, to be by him loaded with stone at his quarries for transportation over its railroad, then it became and was the duty of the defendant to have furnished cars provided with appliances in such a state of repair as that the said Pickle and his employees could, with proper management and reasonable care and prudence, safely manage and control same while so engaged in said work. And if you should find that plaintiff, before the time of the alleged injury, did not know that defendant's cars were not in such condition or repair, he had a right to presume that defendant had done its duty, and that the appliances to said car were in such state of repair and condition as to safely manage and control said cars, with proper use and management, to do the work for which such appliances were designed, and to rely and act upon such presumption."

"4. The court further instructs the jury, if you should find and believe from the evidence in the case that the plaintiff did not know of the alleged condition of the brake referred to in the testimony until after the happening to him of the injury referred to in testimony, and that the condition of said brake would not have been observed by him by the exercise of ordinary care and reasonable prudence and observation on his part, it was not incumbent on plaintiff to

search for and examine for defects in its condition not so observable, but that he had the right to assume that such brake was in a suitable and safe condition as to its being repaired that it would, with proper management, do the work for which it was designed."

The jury found for plaintiff, and assessed his damages at six thousand dollars. Defendant appealed.

1. The action is for negligence. It is charged in the petition "that it was the duty of said defendant to furnish cars to said Pickle properly constructed, and provided with suitable and safe brakes, properly constructed and sufficiently repaired, and in condition to manage, hold, control, and stop its said cars; but plaintiff charges that the said defendant, by its carelessness and negligence, failed to furnish cars so properly constructed, and with suitable and safe brakes, constructed and sufficiently repaired to manage, hold, and control the same."

Definitions of actionable negligence have been given in great variety of forms by courts and text-writers; but whatever the form of simple definition, there is unanimity of expression and opinion that it consists in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby.

Brett, M. R., in *Heaven v. Pender*, 17 Rep. 511, defines actionable negligence "to consist in the failure to exercise ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care, by which failure, the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." This definition is cited and approved by counsel for plaintiff, and may be accepted for the purposes of this case.

The question, then, is, Did defendant owe plaintiff the duty of using ordinary care to furnish cars, in which to load stone, which were properly constructed and provided with suitable brakes? It is insisted that the duty arose either out of the contract between defendant and Pickle, or by virtue of the relationship between plaintiff and defendant, arising out of their respective duties under the contract.

Assuming that the contract between defendant and Pickle, either expressly or by implication, imposed upon the former the duty to supply the latter with cars provided with suitable brakes, and that there was a breach of that duty,

whereby plaintiff was injured, does the contract afford him indemnity for his injuries? The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume: *Winterbottom v. Wright*, 10 Mees. & W. 109; *Burdick v. Cheadle*, 26 Ohio St. 893; 20 Am. Rep. 767; *Maguire v. Magee* (Penn., April 23, 1888), 13 Atl. Rep. 551; *Necker v. Harvey*, 49 Mich. 518; *Savings Bank v. Ward*, 100 U. S. 195; *Deford v. State*, 80 Md. 195; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Sproul v. Hemmingway*, 14 Pick. 1; 25 Am. Dec. 850; *Mann v. Chicago etc. R'y Co.*, 86 Mo. 347; *Lampert v. Laclede Gaslight Co.*, 14 Mo. App. 376; *Gordon v. Livingston*, 12 Mo. App. 267.

The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom v. Wright*, 10 Mees. & W. 109, as follows: "If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop, The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." The other ground is thus stated in the New Jersey case above cited: "The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts."

Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.

2. It is clear from the evidence that plaintiff was in no sense the servant or employee of defendant. He was employed and paid by Pickle, and was subject only to his control

and direction. Defendant had no authority over him; had no power to discharge him for any cause, and had no contract with him. The relation between plaintiff and defendant was not that of master and servant, and the rules of law peculiarly applicable to the duties and liabilities of one to the other have no application. Plaintiff shows no cause of action growing out of any duty defendant owed him, arising from the relationship of master and servant: *Wood on Master and Servant*, secs. 1, 281; *Speed v. Atlantic etc. R. R. Co.*, 71 Mo. 308.

3. There is a class of cases in which one has been held liable to another, in the absence of any contractual or other relationship between them. The rule in such cases is laid down in 2 *Sutherland on Damages*, 435, as follows: "Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to the one injured by the negligence, whether there be a contract between them violated by that negligence or not." The principle is illustrated by the case of *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455. That was a case in which a dealer in drugs had carelessly labeled a poison as harmless medicine, and sent it so labeled into the market. It was held that the dealer was liable to any person who might be injured by the use of the drug. In considering what articles can be regarded imminently dangerous, the same court, in *Loop v. Litchfield*, 42 N. Y. 357, 1 Am. Rep. 543, says: "They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially and in their elements instruments of danger." It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion, it is perfectly harmless, and when in motion, it is not essentially dangerous. We do not think defendant incurred any liability to plaintiff by the simple act of leaving a defective car upon the track: *Chicago etc. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Gurley v. Missouri Pac. R'y Co.*, 93 Mo. 445.

4. What, then, was the true relationship between these parties? and what, if any, duty did defendant owe to plaintiff as the employee of Pickle?

Defendant was engaged in the general business of a common carrier. It operated a railroad between St. Louis and Kansas City. Pickle was the owner of large and valuable stone quarries, situated some distance from defendant's road.

The stone taken from these quarries was merchantable, and was a subject of commerce. The stone was of value only when it could be transported to market. It thus became a matter of mutual interest and profit to defendant and Pickle to provide means for the transportation of this merchandise from the quarry to points at which it could be sold. A contract was entered into between them, by which defendant built a branch or spur road from its main line to the quarries, and also tracks from this spur into the quarries. These were paid for by Pickle. In order to facilitate the transportation of stone, which was beneficial to both parties, it was agreed that defendant should, when cars were needed, place them on the quarry-tracks, or conveniently near to them, and that Pickle should move them, when needed, into position for loading, and when loaded, defendant should take them out, and transport them to their destination. Plaintiff was employed by Pickle, a part of his duty consisting in moving and handling these cars. It did not appear from the evidence what, if any, compensation Pickle received for loading the cars.

The manner of conducting the business is thus detailed by Pickle, superintendent: "The Missouri Pacific railway built that track on the west side of the quarry; Pickle paid for it. The company claims it; they simply constructed it for Pickle. About shipping stone, the bill reads from Warrensburg, of course, but the freight commences from the quarry. The person to whom these cars are sent pays the freight. As to rates, they allowed us a certain amount off from Warrensburg to the quarry; I believe it is \$2.50 or \$5. The freight is included from the quarry, not from town. We don't charter these cars to haul stone to the main line, but charter the cars to wherever the cars are consigned. We don't simply charter the cars to haul the stone from the quarry to Warrensburg. If we have orders to Warrensburg, we bill Warrensburg. All that the railroad company had to do with the movement of these cars is simply to haul the empties out there, and when we have loaded them, the engine comes out and takes them away; that is all they have to do with it. That is not the first car that they sent out there that was out of fix. I have seen as many as ten cars standing there with only two brakes on them."

Under this evidence, it is clear that what was to be done by the respective parties, under the contract, was for their mutual profit, and each was a contractor with the other, to per-

form a particular part of the work necessary to carry out the common purpose. It is now well established that the employer of a contractor is not responsible for the negligence of the contractor or his servants in case the contractor is given entire freedom in the use of means to accomplish the result. Where the employer, however, reserves the right to direct the manner of the performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employees the duty of care in respect to such matters over which he retains control or undertakes to perform: *Whittaker's Smith on Negligence*, 172-174; *Wood on Master and Servant*, sec. 337; *Stewart v. Harvard College*, 12 Allen, 58; *Lancaster v. Connecticut Mut. L. Ins. Co.*, 92 Mo. 460; 1 Am. St. Rep. 739; *Horner v. Nicholson*, 56 Mo. 220; *Devlin v. Smith*, 89 N. Y. 470; 42 Am. Rep. 811; *Caughtry v. Woolen Co.*, 56 N. Y. 124; 15 Am. Rep. 387; *Deford v. State*, 80 Md. 179; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; 83 Am. Rep. 423; *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; 75 Am. Dec. 305; *Hanna v. Chattanooga etc. R'y Co.*, 88 Tenn. 310; *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 241; 11 Am. St. Rep. 410; *Conlon v. Railroad*, 15 Am. & Eng. R. R. Cas. 99.

We think each of these contracting parties owed to the other and his employees the duty of properly discharging his part of the joint undertaking, in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was intrusted entirely to defendant. They were intended for the use of Pickle and his servants in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use.

5. The evidence does not show conclusively such contributory negligence on the part of the plaintiff as should, as a matter of law, preclude a recovery. Plaintiff, in testifying as a witness, it is true, admitted that one half the cars furnished Pickle by defendant were without brakes. On the other hand, Pickle's superintendent testified that he generally examined the cars himself, and if any were found defective, he gave notice of such defects to those who handled them. Whether under these circumstances, and the fact that the brakes appeared, from plaintiff's position on top of the car, and from his efforts to set them, to be in good condition, plaintiff used

such precautions as ordinary care and prudence required of him, was a question for the jury.

It is not every case in which there is no conflict in the facts that the court will declare, as a matter of law, the legal effect of the evidence. If, upon all the facts and circumstances, there is room for fair and sensible men to differ in their conclusions, the jury should decide: *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219; 39 Am. Rep. 503; *Reilly v. Hannibal etc. R. R. Co.*, 94 Mo. 609; *Thorpe v. Missouri Pac. R'y Co.*, 89 Mo. 651; 58 Am. Rep. 120; *Wood's Railroad Law*, 1460; *Wood on Master and Servant*, 761.

6. The instruction, in directing the jury that plaintiff had the right to assume that defendant would furnish Pickle with cars properly supplied with brakes in good repair and condition, properly declared the law as applied to the duty a master owes to his servant. But if the servant was informed by the master, or had learned by observation or from any other source, that some of the instrumentalities furnished him were defective and dangerous, and without promise that they would be repaired he continued in the master's service, then the risk of injury from such defective instrumentalities would become an incident to such service which he would assume: *Price v. Hannibal etc. R. R. Co.*, 77 Mo. 508; *Porter v. Hannibal etc. R. R. Co.*, 71 Mo. 66; 36 Am. Rep. 454; *Devitt v. Pacific R. R. Co.*, 50 Mo. 302; *Thorpe v. Missouri Pac. R'y Co.*, 89 Mo. 650; 58 Am. Rep. 120.

While the relation of master and servant did not exist between these parties, defendant owed to plaintiff the observance of reasonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing his servant with the instrumentalities for carrying on his business. No reason can be seen why, if plaintiff knew that defective and dangerous cars were frequently left for his use, he would not assume the risk of injuries from such defects as could have been ascertained by reasonable inspection on his part. While defendant may have been negligent in the discharge of the duties it owed to plaintiff, if plaintiff neglected such precautions as common prudence demanded, under all the circumstances, he was guilty of contributory negligence, which should have defeated a recovery.

In view of the fact that plaintiff himself testified that one half the cars were without brakes, it was not proper to in-

struct the jury that he had the right to rely on defendant's performance of its duty in furnishing such as were properly supplied with brakes. The knowledge plaintiff had of the common neglect of defendant imposed upon him, for his own protection and safety, the duty of reasonable care in ascertaining for himself the condition of the cars before he attempted to handle them, and a failure to do so would constitute contributory negligence on his part. Whether such care was used on the occasion of his injury should have been submitted to the jury.

For the errors mentioned, the judgment is reversed, and cause remanded.

NEGLECT, DEFINITION OF. — To maintain an action for negligence, it must appear that there existed some duty on the part of the defendant towards the plaintiff which was not performed, in consequence of which the latter was caused to suffer: *Smithwick v. Hall etc. Co.*, 59 Conn. 261; 21 Am. St. Rep. 104, and note; *Ellis v. Lake Shore etc. R. R. Co.*, 138 Pa. St. 506; 21 Am. St. Rep. 914; *Phillips v. Craft*, 139 Pa. St. 125; *Lake Shore etc. R. R. Co. v. Parker*, 131 Ill. 557; *Tucker v. Illinois C. R. R. Co.*, 42 La. Ann. 114; *Van Winkle v. American etc. Co.*, 52 N. J. L. 240; *Larson v. St. Paul etc. R. R. Co.*, 43 Minn. 488. In the absence of any legal duty which has been violated, there can be no actionable negligence: *Fletcher v. Scotten*, 74 Mich. 212. Actionable negligence must have been the proximate cause of the injury: *Cumberland etc. R. R. Co. v. State*, 73 Md. 74.

CONTRACTS, BREACH OF, WHO MAY MAINTAIN ACTIONS FOR. — The rule is, that no one maintain an action upon a contract to which he is not a party: *Cocks v. Varney*, 45 N. J. Eq. 72; *De Wit v. Lander*, 72 Wis. 120; *Kee v. Davidson*, 73 Cal. 522; *Fowler v. Athens etc. Co.*, 83 Ga. 219; 20 Am. St. Rep. 313, and note; but an exception to such rule exists where the contract was entered into for the benefit of a third party, though he is not named: *State v. Laclede Gaslight Co.*, 102 Mo. 472; 22 Am. St. Rep. 789, and note; *Adams v. Kucka*, 119 Pa. St. 76; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Grant v. Diebold etc. Co.*, 77 Wis. 72.

NEGLECT — INDEPENDENT CONTRACTOR. — One who employs a fit and proper person as an independent contractor to do work not in itself unlawful, or a nuisance, or necessarily attended with danger to others, is not responsible to third persons for the contractor's negligence, nor for that of his subcontractors or agents: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925, and note; *Mumby v. Bowden*, 25 Fla. 455; *Fleming v. Pennsylvania R. R. Co.*, 134 Pa. St. 477; *State v. Swayne*, 52 N. J. L. 129; *Harrison v. Kiser*, 79 Ga. 589; *St. Louis etc. R'y Co. v. Yonley*, 53 Ark. 503; *Smith v. Belahan*, 89 Cal. 428; but this rule does not apply where the employer still reserves in himself the control and direction of the work: *McDonell v. Rifle Boom Co.*, 71 Mich. 61; *Mumby v. Bowden*, 25 Fla. 455; *Vincennes etc. Co. v. White*, 124 Ind. 376.

NEGLECT — QUESTION FOR WHOM, WHEN THE FACTS ARE UNDISPUTED. — When the facts are undisputed, and two reasonable persons might draw inferences from them so different that, according to the conclusion of fact reached by one there would be negligence, while that deduced by

another would show the exercise of ordinary care, the issue should be submitted to the jury: *Deane v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note.

MASTER AND SERVANT — ASSUMPTION OF RISK. — As to the effect of a promise on the part of the master to repair defective machinery upon the servant's right to recover for injuries received by him by reason of a failure to perform such promise, see note to *Gulf etc. R'y Co. v. Brentford*, 23 Am. St. Rep. 385-388; *Rogers v. Leyden*, 127 Ind. 50; *Ehmcke v. Porter*, 45 Minn. 338. A servant voluntarily undertaking the risk of an obvious danger cannot recover for injuries occasioned therefrom, even though he exercised due care: Note to *Smithwick v. Hall etc. Co.*, 21 Am. St. Rep. 110. Continuing to use defective machinery after discovery of the defects constitutes contributory negligence on the part of a servant, where the master has not promised to repair: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note.

COMPARE THE CASE OF *Moon v. Northern P. R'y Co.*, 46 Minn. 106, *ante*, p. 194, the facts underlying which are somewhat analogous to those of the principal case.

STATE v. SHROYER.

[104 MISSOURI, 441.]

CRIMINAL LAW — ASSAULT TO RAPE — ACTUAL VIOLENCE, OR TOUCHING THE PERSON of the one assaulted, is not essential to the crime of assault to rape. If the intent, with the present means of carrying it into effect, exists, and preparation therefor has been made, the crime is complete.

CRIMINAL LAW — ASSAULT TO RAPE. — In order to constitute the crime of an assault with intent to rape, it is immaterial whether or not the sexual connection was accomplished by actual physical force to the intended victim, or while she was asleep.

CRIMINAL LAW — ASSAULT TO RAPE — EVIDENCE OF REPUTATION FOR VIRTUE AND CHASTITY. — In discrediting a witness, the inquiry may extend to his general character for virtue, sobriety, and chastity. This rule applies to one testifying on his trial for an assault with intent to commit rape.

PRACTICE — RIGHT TO REOPEN CASE. — The right of defendant in a criminal trial to reopen the case for the purpose of introducing additional proof of his reputation for truth and morality is entirely within the discretion of the court. Its refusal to so reopen the case is not a ground for reversal, unless such discretion has been abused or unfairly exercised.

T. C. Dungan, for the appellant.

John M. Wood, attorney-general, for the respondent.

MACFARLANE, J. Defendant was indicted, tried, and convicted of an assault with intent to commit a rape upon Arminta Murphy.

The circumstances of the assault, as gathered from the evidence, were in substance as follows: The house of Patrick

Murphy consisted of two rooms, the one on the south fronting the road, and the other north of it. At the time of the assault Patrick Murphy was absent from home. His children, Catherine, the eldest, Arminta, about fourteen years of age, and two sisters and a brother, all younger than Arminta, were at home. On the night of August 28, 1876, these children all slept in the south room of the house. This room had a door in the south, and a window on each side of the door. The night being very warm, all the children except Catherine slept on the floor. Catherine was upon the bed. The door was left open.

Catherine, the only witness who saw the alleged assault, testified: "I first heard a noise, heard the door-sill creak, but thought it was the dog. I looked round and saw the defendant — saw Shroyer — on his hands and knees in the door; he crawled to brother, laid his hand on him, and then crawled round about their feet to Alice, who was lying in the middle, and touched her, then crawled over to Arminta,— crawled up by the side of her, and put his hand on her arm; none of them moved.' Arminta was lying on her left side, with her face towards the east; he was lying close to her, on the east side, with his face towards her face, when he was lying down,— lying just up against her. He lay that way for a minute, then he kind of raised partly up and looked round the room. Then he took his left hand and begun to unfasten his pants. The moon was shining outdoors, and he was almost between me and the door. I could see that he was unbuttoning his pants. I halloed, and he lay down again as if to hide, and was still a moment. I halloed again; he then partly rose, crawled towards the door quickly on his hands and knees; as he got about the door, he rose up on his feet and went out."

1. Defendant insists that the evidence did not sustain the charge of the indictment, and does not justify the verdict. It was not necessary, in order to constitute an assault, that actual violence should have been used. To sustain such an indictment, it is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent, with the present means of carrying it into effect, exists, and preparations therefor have been made, the assault is complete: *State v. Smith*, 80 Mo. 518; *State v. Montgomery*, 68 Mo. 296; *State v. Eddings*, 71 Mo. 545; 86 Am. Rep. 496; 1 Wharton's Crim. Law, sec. 576.

It was the evident intention of defendant to have connection

with the girl without her consent, and whether it was to be by actual physical force, or during the unconsciousness of sleep, is wholly immaterial. There could have been no consent while the intended victim slept: *State v. Eddings*, 71 Mo. 545; 36 Am. Rep. 496; *Queen v. Dee*, 31 Alb. L. J. 48; *Reg. v. Meyers*, 12 Cox C. C. 311; *Harvey v. State*, 53 Ark. 425; 22 Am. St. Rep. 229; *State v. Smith*, 80 Mo. 518, and authorities cited. The acts and conduct of defendant left no doubt of his criminal intent.

2. Defendant testified as a witness upon the trial in his own behalf, and in rebuttal the state introduced evidence to discredit his testimony. The impeaching witnesses were permitted, over defendant's objection, to testify as to defendant's general reputation for virtue and chastity. Defendant claims that error was committed in doing so.

The authorities are not harmonious on this question. It is held in some states that the impeaching testimony must be confined to the reputation of the witness for truth and veracity, and in others that it may be properly extended to general moral character, and in others, again, to moral character in particular respects. A collection of the authorities may be found in 30 Cent. L. J. 241. This court has followed the rule that in discrediting a witness the inquiry may not only be extended to his general character, but to his character in respect to particular matters, as sobriety and chastity: *State v. Shields*, 13 Mo. 236; 53 Am. Dec. 147; *State v. Grant*, 76 Mo. 236; *State v. Rider*, 95 Mo. 486. This rule seems to be in conflict with the current of authority, but no reason can be seen why it should be changed. The Rider case, above cited, allows the reputation for chastity to be shown to discredit a male as well as a female witness, contrary to an intimation of this court in the Grant case (76 Mo. 236). That there should be a distinction made between the sexes in this respect cannot be justified on the grounds usually given. If it be true that the general character of a man is not affected by his reputation for unchastity, the evidence of such reputation will do him no injury.

3. The day after both parties had closed their case, defendant asked the privilege of introducing other testimony in support of the reputation of defendant for truth and morality. This the court refused, and its action is assigned as error. This was a matter almost entirely within the discretion of the court, and it does not appear that the discretion was un-

fairly or unsoundly exercised, and its action is not cause for reversal: *Harvey v. Brooke*, 36 Mo. 493; *Van Studdiford v. Hazlett*, 56 Mo. 322. The reputation of a witness is always open to attack, without notice to the opposite party. A party should come prepared to meet such attacks. Particularly should this be the case where a party to a suit or prosecution intends to testify in his own interest.

4. The instructions given the jury by the court are fair, and properly declare the law. The only objection specially urged to them is in the fact that they authorized the jury to find an assault under the facts detailed in the evidence. This raises the same question already disposed of in considering whether the verdict was justified under the evidence, and need not be considered further.

5. Complaint is made that the court did not instruct the jury "on the effect of the evidence tending to prove an *alibi*." Without going into a consideration of the scope of that provision of the statute imposing upon trial courts the duty of instructing the jury upon all questions of law "which are necessary for their information in giving their verdict," we deem it sufficient to say that the jury needed no information, and it was not necessary to instruct them that if defendant was not present at Murphy's house on the occasion of the assault, he was not guilty of making the assault. The general instruction given to the jury, that if they had a reasonable doubt of defendant's guilt, they should acquit him, sufficiently covered the law arising on the "effect of the evidence tending to prove an *alibi*."

No error being found in the record, the judgment is affirmed.

CRIMINAL LAW — ASSAULT TO COMMIT RAPE — VIOLENCE TO OR TOUCHING OF PERSON UNNECESSARY TO CONSTITUTE. — A negro, seeing a white woman passing through a piece of woods, chased her, and called on her to stop. He did not overtake her, but did not cease his chase until in sight of a dwelling. He was convicted of assault with intent to rape: *State v. Neely*, 74 N. C. 425; 21 Am. Rep. 496. A man entered a woman's room during the night while she was asleep and grasped her ankle, and hastily retreated when she screamed. This was held sufficient evidence to go to the jury on a trial for an assault to commit rape: *State v. Boon*, 57 Am. Dec. 555. Penetration is not an essential element of the crime of assault with intent to commit rape: *People v. Courier*, 79 Mich. 366.

OATES v. UNION PACIFIC RAILWAY COMPANY.

[104 MISSOURI, 514.]

STATUTE GIVING CAUSE OF ACTION — EXTRATERRITORIAL EFFECT — PARTIES. — Where a statute of one state gives a cause of action to the "personal representative" of a person killed by a wrongful act, the widow of one so killed in that state cannot maintain an action in her private capacity under such statute in another state, although under the laws of the latter she could have maintained an action if the accident had happened there, and although no administrator could be appointed in the state where the deceased was killed, because he left no estate there.

STATUTE GIVING CAUSE OF ACTION — PARTIES. — Where a statute gives a cause of action and designates the persons who may sue, and the time within which their action must be brought, none but the parties so designated can sue, and their action must be brought within the time prescribed by the statute.

Sherry and Hughes, for the appellant.

John W. Beebe, for the respondent.

BLACK, J. The petition discloses these facts: The defendant, the Union Pacific Railway Company, owns and operates a railroad in the state of Kansas, which extends into this state. The defendant's servants carelessly and negligently ran a train of cars upon J. M. Oates at a point in the state of Kansas, inflicting injuries upon him, from which he died the next day, namely, June 9, 1885. Oates was not in the employ of the defendant at the time he was injured, but he was in the employ of another railroad company. At and prior to his death he resided in this state, and he left surviving a widow and three minor children. Plaintiff, who is the widow of deceased, brought this suit in the courts of this state for the death of her husband, laying her damages at the sum of ten thousand dollars, and founding her cause of action upon the statute laws of the state of Kansas, which are set out in the petition.

The circuit court sustained a demurrer to the petition, and the sole question before us is, whether the plaintiff can maintain this suit in the courts of this state.

As the plaintiff founds her cause of action upon the statute laws of the state of Kansas, and she is also forced to rely somewhat upon the statute laws of this state, we shall first set out, in words or substance, the statute laws of the two states.

The statute of the state of Kansas, set out in the petition, is in these words: "When the death of one is caused by the

wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It is conceded that the words "personal representatives" mean the executor or administrator, and that under the rulings of the supreme court of Kansas the suit cannot be maintained by the widow and children, or by either, but must be brought by the executor or administrator, he to make distribution to the widow and children, or next of kin.

Had Oates received the injuries causing his death in this state, then, under the circumstances set out in the petition, the cause of action would come under the second section of our damage act, which fixes the amount of the forfeiture or damage at the sum of five thousand dollars, to "be sued for and recovered, — 1. By the husband or wife of deceased; or 2. If there be no husband or wife, or he or she fails to sue within six months after such death, by the minor child or children of the deceased; or 3. If such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor."

We have pressed upon our attention in this case, as we did in the case of *Vawter v. Missouri Pac. Ry Co.*, 84 Mo. 679, 54 Am. Rep. 105, a class of cases to the general effect that a right of action created by the statute of one state may be prosecuted in another state, where the two states have statutes relating to the same subject which are alike or similar in substance and effect. We were of the opinion that these cases then cited did not rule that case, and we are of the opinion they have little or no application to the case in hand. In that case the plaintiff was the administrator of the estate of the person who died from injuries received in the state of Kansas. The plaintiff received her appointment as administratrix in this state, and then commenced suit in this state, founding her cause of action upon the before-quoted statute of the state of Kansas. Having been appointed administratrix in this state, she of course possessed the powers, and the

powers only, conferred upon her by the laws of this state. The laws of this state gave her no authority to prosecute such a suit. They not only gave her no such authority, but they denied an executor or administrator the right to prosecute an action on the case for injuries to the person of the testator or intestate: Rev. Stats. 1879, secs. 96, 97. We therefore held that the administratrix could not maintain the action, and from that ruling we make no departure. The conclusion reached in that case has the support not only of the cases there cited, but also of the court of appeals of Maryland in *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144; 20 Am. St. Rep. 461. The Vawter case is, of course, not decisive of this one; for here the suit is brought by the widow, not by an administrator having no power to prosecute such a suit.

As we have said, the plaintiff founds her cause of action upon the statute of the state of Kansas. According to that statute the cause of action accrued to the executor or administrator of the deceased person. It is true, the damages, not to exceed ten thousand dollars, inure to the benefit of the widow and children, or next of kin, to be distributed in the same manner as personal property of the deceased is distributed in that state. But the executor or administrator is the only person who can sue for and recover the damages. The plaintiff in this case could not maintain the suit in that state. Though the cause of action is based upon a statute of that state, and though the present plaintiff could not prosecute the suit in that state, yet we are asked to say she may prosecute it in this state. This we cannot do. Says Mr. Wood: "It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time and in the manner therein provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, no other person can maintain an action": 8 Wood's Railroad Law, sec. 413. The statute gives the cause of action, and points out the persons who may sue, and they, and they alone, can sue, and they must sue within the time prescribed by the statute: *Barker v. Hannibal etc. R. R. Co.*, 91 Mo. 86. The fact that by the statute of this state the widow, under the circumstances detailed in the petition, could sue for and recover the fixed sum of five thousand dollars does not aid the plaintiff, for our statute has no extraterritorial operation. As the plaintiff could not prosecute this suit in that state, she cannot prose-

cute it in this state. This we think too clear to admit of any doubt. If by the laws of that state she could prosecute the suit, then a different question would be presented for our consideration.

On behalf of the plaintiff it was argued at the bar of this court that an administrator appointed in this state cannot prosecute this suit in the courts of Kansas, and so it has been held in *Limekiller v. Hannibal etc. R. R. Co.*, 33 Kan. 83, 52 Am. Rep. 523, that no administration can be granted upon the estate of the deceased in the state of Kansas, because he had no property in that state; that plaintiff cannot maintain this suit in that state; and that she is therefore without remedy, unless she is allowed to prosecute the present action in her own name in this state. The answer to all this is, that any omission in the statute laws of the two states must be supplied by the legislatures thereof. While it is suggested there has been some such legislation of late, it is not claimed that it can or does affect this suit. The judgment is therefore affirmed.

ACTIONS IN ONE STATE TO ENFORCE CAUSES OF ACTION CREATED BY THE STATUTES OF ANOTHER: See *Wooden v. Western etc. R. R. Co.*, 128 N. Y. 10; 22 Am. St. Rep. 803, and note; note to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355.

SPARKS v. DISPATCH TRANSFER COMPANY.

[104 MISSOURI, 321.]

CORPORATIONS — POWER OF PRESIDENT TO CONTRACT. — The president of a business corporation may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incidental to his office, and may bind the corporation by contracts in matters arising in the usual course of business. The rule is here applied to notes given in the name of the corporation by its president for the purchase price of mules.

CORPORATIONS — LIABILITY ON NOTE SIGNED BY PRESIDENT IN HIS NAME ALONE. — When the president of a corporation signs a negotiable note in his own name alone, with nothing on the instrument to indicate that he is acting as the agent of the corporation, parol evidence is not admissible to establish such agency.

CONTRACT — ESTOPPEL — SIGNING INSTRUMENT IN ANOTHER'S NAME. — A party may bind himself by another than his true name, when he signs any instrument with intent to bind himself, or signs any name under which he is shown to have held himself out to the world and carried on business.

Lathrop, Smith, and Morrow, for the appellant.

Peak, Yeager, and Ball, for the respondents.

GANTT, P. J. The notes sued on in this case were all executed by Stewart Jackson, who was at the time of their execution the president of the defendant below, appellant here. The first two were signed in the name of the Dispatch Transfer Company, by Jackson as president; the other three by Jackson, without any reference to the corporation, or any words indicating that he intended to bind any one but himself. The appellant seeks to avoid liability for any of these notes, but its defense differs, as to the first two, from its defense to the remaining three. Counsel for appellant argues that the evidence did not justify the instructions given for respondents, by which appellant was held liable on the two notes signed with the corporate name. Those instructions, in substance, declared the law to be, that if the jury should find that Jackson was the president of the defendant, and that defendant allowed him to act as their purchasing agent in buying stock in the name of the company, and recognized his act as such by paying his orders given on the company, or by paying his notes given by him for stock so purchased by him of plaintiffs, then defendant was bound by his acts in purchasing the mules of plaintiffs, and for the notes sued on in the first two counts, unless plaintiffs knew, or had reasonable means of knowing, that Jackson was buying these mules on his individual account.

The power of Jackson to bind the defendant is governed by the law of agency. The principle underlying is the same, whether the principal be a corporation or an individual. It is now well settled that when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. This is only the application of the principle that usual employment is evidence of the powers of an agent, and the principal is held responsible for the acts of his agent within the apparent authority conferred on the agent: *First Nat. Bank v. North Missouri etc. Co.*, 86 Mo. 125; *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Kiley v. Forsee*, 57 Mo. 390; *Martin v. Webb*, 110 U. S. 7; *Mining Co. v. Anglo-California Bank*, 104 U. S. 192. The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and

may bind the corporation by contracts in matters arising in the usual course of business: Boone on Corporations, sec. 144; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

In the case at bar Stewart Jackson was president of defendant. He purchased every mule that defendant owned from its organization until after the execution of the notes sued on in this case. He had repeatedly signed notes in the name of the corporation, and the corporation had honored his orders and paid his notes so drawn. Plaintiffs had thirteen different transactions with him as the president and purchasing agent of the defendant prior to the giving of the notes herein, and his acts had always been ratified. The defendant was engaged in a transfer business in which the motive power was mules, and it was its written charter privilege to buy mules and execute its notes therefor. Jackson had purchased mules for the defendant of the plaintiffs; and on this occasion he informed them he was purchasing the mules for which these two notes were given for the defendant. His transaction, under the evidence, was within both his actual and apparent authority to bind the defendant. The evidence is amply sufficient to bind defendant on those two notes; and there was no error in the instructions given for plaintiffs on these two notes, and certainly defendant ought not be heard to complain.

The action of the court in admitting parol evidence to show that the defendant was liable on the three notes sued on in third, fourth, and fifth counts, notwithstanding its name nowhere appeared on the notes, and in instructing the jury, as it did in the eighth instruction, for the plaintiffs, presents for our consideration a question of great practical importance, and much depends upon its right decision. The exact question here presented has not been passed on by this court in any case that we have been able to find, but it has been long settled in many of our sister states. In Massachusetts as early as 1814, in the case of *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150, it was held that "where one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the contract itself that he acts as such agent"; and oral testimony was held inadmissible to contradict, vary, or materially affect the written contract. The same question came before the same court again in 1868, in *Brown v. Parker*, 7 Allen, 337. In that case one N. H. Streeter had signed two negotiable notes, and it was sought to hold defendant Parker, on the

ground that Streeter was his agent, and intended to bind defendant. The court says: "But in suits on promissory notes or bills of exchange no evidence is admissible to charge any person as principal whose name is not in some way disclosed on the face of the note or draft. This point has been often decided in this commonwealth, and the reasons on which the rule rests have been fully stated in very recent decisions"; citing *Slawson v. Loring*, 5 Allen, 340, 81 Am. Dec. 750, and cases cited, in which it was said by Chief Justice Bigelow: "Being negotiable paper, all evidence *dehors* the draft is to be excluded. It is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face of the draft; that the plaintiff knew that he was so, and that the defendant had no personal interest in the company."

In New York, in *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558, the cases, both in England and in the different states of the Union, were reviewed, and the conclusion reached "that no person can be considered a party to a bill, unless his name, or the name of the firm of which he is a partner, appear on some part of it"; citing *Chitty on Bills*, 22; *Fenn v. Harrison*, 8 Term Rep. 757; *Emly v. Lye*, 15 East, 6. And this rule is universally accepted as the law by the recent text-writers on commercial paper: *Tiedeman on Commercial Paper*, sec. 87; *Randolph on Commercial Paper*, sec. 181. "The reason of the rule is, that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment. It is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself": 1 *Daniel on Negotiable Instruments*, sec. 803; *Mechem on Agency*, 285-287; *Heaton v. Meyers*, 4 Col. 59. And another good reason for the rule is, that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting.

Counsel for respondents claim that this doctrine has been repudiated by this court in a number of decisions, and the importance of the question, and the earnestness with which this is urged, demand that we should state our reasons for declining to take that view of the case. The leading case

relied upon by respondents is *Washington etc. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480. The note which was the basis of the action in that case was as follows: —

“\$750.

“For value received in policy No. 2969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company of St. Louis, I promise to pay said company (or their secretary for the time being) the sum of \$750, in such portions and at such time or times as the directors of said company may, agreeably to their acts of incorporation, require.

“DANIEL MCCARTHY, President.

“Per THOMAS BURKE.”

This court held that it was competent to explain the ambiguity on the face of the note itself. Speaking for the court, Judge Sherwood said in that case: “In the present case, the note sued on is signed ‘Daniel McCarthy, President.’ But president of what? Just here, under the rules laid down in the above cases, parol evidence steps in and affords a ready and satisfactory explanation. The word ‘president,’ attached to the name of Daniel McCarthy, is an ear-mark of the official capacity in which the note was signed, — not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact.”

Moreover, in that case the note on its face referred to policy No. 2969, which insured the seminary building and church building belonging to St. Mary's Seminary. It will be observed, — 1. That the above note is not negotiable; and 2. That the ambiguity appears on its face, growing out of the word “president,” affixed to McCarthy's name. In the case at bar, the notes are, by their terms, negotiable, and contain nothing but Jackson's name as maker; so that this case is not authority, because the facts are entirely different. It is true, however, that in this case Judge Sherwood quotes from the decision in *Mechanics' Bank of Alexandria v. Bank*, 5 Wheat. 827, in which the supreme court of the United States says: “It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency.” If this were all, it must be conceded that respondents are justified in claiming that this decision is broad enough to permit parol evidence in any case to explain who

was the principal, notwithstanding there is no intimation on the face of the paper that any one but the agent is a party to it. But the supreme court of the United States did not put their decision on that ground; but on the contrary, Johnson, J., who delivered the opinion, expressly says: "But the fact that this appeared on its face to be a private check is by no means to be conceded; on the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction. But it is enough for the purposes of a defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other, and in such a case to resort to extrinsic evidence to remove the doubt." So that it seems clear that the supreme court placed its decision upon the fact that upon the face of the paper the ambiguity appeared. That court would never have held that there was any ambiguity on the face of the notes sued on in the third, fourth, and fifth counts in the case at bar: *Falk v. Moebs*, 127 U. S. 597.

In *Smith v. Alexander*, 31 Mo. 198, the action was on the following note:—

"\$500.

St. Louis, Mo., July 22, 1855.

"Ninety days after date, I promise to pay to the order of Messrs. Smith & Co. five hundred dollars, for value received, negotiable and payable without defalcation or discount.

"J. H. ALEXANDER,

"Treasurer Ohio and Mississippi R. R. Co."

In that case Alexander, having been sued on this note, was allowed to show that he was treasurer of the said railroad, and that he gave the note simply as agent of said company, Ewing, J., saying: "A mere addition to the name of the party signing the contract cannot be regarded as a certain *indicium* that it was made on behalf of another. When, however, it is doubtful from the face of the contract whether it was intended to operate as a personal engagement of the party signing it or to impose an obligation on some third person as principal, evidence is admissible to show the character of the transac-

tion." So we see that Judge Ewing places his ruling on the doubt appearing on the face of the note, whether it was the obligation of Alexander or the railroad company.

Shaelts v. Bailey, 40 Mo. 69, was an action on a contract for half the value of a partition wall. It was not a negotiable instrument at all, and in that case the contract was signed, "Kenneth McKenzie, Agent for Volney Stevenson, on the first part"; so that case is not similar in any legal feature to the one at bar. In *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316, action was brought on a written assignment of a certain claim against Johnson and others by Isaac H. Sturgeon, President North Missouri Railroad Company, "attested with the seal of the company, and countersigned by George H. Blood, Secretary North Missouri Railroad Company." It was held to be the act of the company. The instrument was not negotiable, and the paper on its face clearly showed it was the intention to assign the railroad company's right.

The next case we are cited to is *Ferris v. Thaw*, 72 Mo. 446. In that case the note or instrument read:—

"\$4,000.

St. Louis, Mo., October 8, 1870.

"Twelve months after date, I promise to pay to the order of John W. Luke, treasurer, four thousand dollars, without defalcation or discount, for value received, negotiable and payable at the third National Bank of St. Louis, with ten per cent interest from date, payable semi-annually.

"CHARLIE THAW,

"W. M. Polar Star Lodge No. 79.

[Indorsed] "JOHN W. LUKE, Treasurer."

In that case the defendants were sued as members of Polar Star Lodge No. 79 of Ancient Free and Accepted Masons. Defendant Thaw was its chief officer, with the title of worshipful master. In that case it was shown that the lodge was an unincorporated body; that it had borrowed this four thousand dollars for lodge purposes. The loan was reported to the lodge, and was approved at its meeting, all the defendants voting therefor. It will be observed that in this case the ambiguity appears on the face of the paper, and the court properly permitted evidence to show who were the real principals, and the members of the lodge which received the money were held on it. It is true, the learned judge quotes from Story on Agency, and uses language that might be construed to include any undisclosed principal; but it is not practicable in every case to go over the entire law, and point out

all the qualifications that might be mentioned, and when the law as quoted applies to the controlling facts in the case, it must be understood as referring to those facts. It is clear to us that the learned judge who delivered that opinion had no intention of discussing the proposition now under consideration. The case was placed upon the ground that the lodge having failed to become a corporation, its members were liable as copartners; and they were all shown to have ratified the act of the worshipful master, and his agency appeared on the paper itself, so that it was unnecessary to discuss the question as to the liability of a person on an instrument to which he was not a party: *Martin v. Fewell*, 79 Mo. 401; *Richardson v. Pitts*, 71 Mo. 128.

It remains only to notice *Franklin Avenue German Sav. Inst. v. Board of Education*, 75 Mo. 408. That was an action on a school bond, as follows:—

“It is hereby certified that the special school district of the town of Roscoe, county of St. Clair, state of Missouri, is indebted to ———, or bearer, in the sum of five hundred dollars, payable. . . . This bond is issued under and by virtue of an act of the legislature of Missouri entitled ‘An act to authorize cities, towns, and villages to organize for schools with special privileges.’

“JAS. SMANGER, President.

“HENRY SWANN, Secretary.”

Of course, on the face of this bond, it was the bond of the school district, and no such question as the one at bar was before the court.

In *Snider v. Adams Exp. Co.*, 77 Mo. 525, Snider was the consignor of the lost package, and this court held that although the package was the property of his sister Louisa, that Snider was the trustee of an express trust, and authorized to sue. No question of negotiable paper was involved in the case, so that it will appear from an examination of each of the cases relied on by respondents as sustaining the action of the court in admitting parol evidence to show that Jackson was in fact the president and purchasing agent of appellant, and executed the three notes described in third, fourth, and fifth counts in behalf of said company, they are all unlike this case, in that in each of them there was some addition, such as “president,” “worshipful master,” “treasurer,” or some title designating an agency on the face of the paper itself, and in such cases the law permits the ambiguity to be explained;

and indeed, in all other contracts except bills of exchange and negotiable promissory notes, it is always permissible to show by parol evidence who is the real principal: Tiedeman on Commercial Paper, sec. 87, and authorities cited. But wherever the cases have been reviewed we think it will be found that, although the rule has been relaxed in those cases where the maker or drawer adds the word "agent," or "president," or the like, after his name, yet in negotiable instruments, when the principal's name does not appear, he is not liable on the bill or note as a party to the instrument: *Devendorf v. West Virginia Oil etc. Co.*, 17 W. Va. 135; *Fuller v. Hooper*, 8 Gray, 341; *Williams v. Robbins*, 16 Gray, 77; 77 Am. Dec. 896; *Pease v. Pease*, 35 Conn. 131; 95 Am. Dec. 225; *Keck v. Sedalia Brewing Co.*, 22 Mo. App. 187; *Bartlett v. Tucker*, 104 Mass. 339; 6 Am. Rep. 240.

What we have here said is not in conflict with another equally well-settled rule, that a party may bind himself by another than his true name, where he signs any instrument with intent to bind himself, or signs any name under which he is shown to have held himself out to the world and carried on business. In these cases he is as much liable as if he had signed his true name: *Bartlett v. Tucker*, 104 Mass. 339; 6 Am. Rep. 240.

With this view of the law, then, we hold the court erred in the admission of parol evidence to show that Jackson executed the three notes sued on in third, fourth, and fifth counts, and in giving instruction numbered 8, as prayed by plaintiffs. In regard to the refusal to give the twenty-third instruction, asked by defendant, we think the court committed no error. We do not think any such issue was properly tendered the plaintiffs, nor do we think there was sufficient evidence to justify it, if properly pleaded. We are driven by our views of the law to affirm the judgment of the circuit court on the first and second counts, and reverse the judgment on the third, fourth, and fifth counts: *Hunt v. Missouri R. R. Co.*, 89 Mo. 607, and cases cited.

CORPORATIONS — POWERS OF PRESIDENT. — The president may, without express authority, perform all acts which are incident to the execution of the trust reposed in him, and which custom or necessity imposes upon the office: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621; *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; 68 Am. Dec. 544.

PAROL EVIDENCE — CONTRACTS. — A note signed by "S. G. D., Agent," must be treated as the note of S. G. D.; and parol evidence is inadmissible to

prove that it is the note of another person, unless such person carried on business under the name of his agent, in which case the name of the agent will be regarded as the business name of the principal: *Tarver v. Garlington*, 27 S. C. 107; 18 Am. St. Rep. 628, and note 631, 632. In an action against A. J. B., treasurer, who indorsed a promissory note, extrinsic evidence is admissible to shew that he indorsed only in his official capacity as treasurer of a corporation: *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293. Compare *Rendell v. Harriman*, 75 Me. 497; 46 Am. Rep. 421; *Pease v. Pease*, 35 Conn. 181; 95 Am. Dec. 225; *Traynham v. Jackson*, 15 Tex. 170; 65 Am. Dec. 152.

STATE v. HAYES.

[105 MISSOURI, 76.]

CRIMINAL LAW — ASSISTING IN THE COMMISSION OF WHAT ONE BELIEVES TO BE A CRIME. — Though one assists, with felonious intent, in the commission of what he believes to be a burglary, yet if the person whom he so assists has no such intent, and is merely seeking to give others an opportunity to catch his assistant while committing the crime, such assistant is not guilty of burglary, unless in the assistance which he rendered he committed every overt act necessary to constitute that crime.

CRIMINAL LAW — DECOYS AND CRIMINALS. — When one who is willing to commit a crime acts in concert with another, who is seeking to decoy him and to secure his apprehension and punishment, if each of the acts essential to the perpetration of the crime is done by the defendant with criminal intent his guilt is complete, no matter what motives may prompt or what acts may be done by the party who is apparently assisting him, but the defendant, though present with a criminal intent, cannot be charged with any of the acts of the decoy, whose intent is not criminal. Hence the defendant can be convicted of such crime only as resulted from his own overt acts.

A. C. Eubanks and A. D. Christy, for the appellant.

John M. Wood, attorney-general, for the state.

THOMAS, J. The defendant appeals from a sentence of five years' imprisonment in the penitentiary for burglary and larceny, by the circuit court of Sullivan County, November 28, 1887.

The evidence shows that A. Payne and Son kept a general store in Boynton, Sullivan County, in 1886, and that on the night of June 1, 1886, Addison Payne, Jr., one of the members of the firm of A. Payne and Son, and Enoch Van Wye, Frank Van Wye, James Yardley, Sherman Van Wye, and John E. Senate secreted themselves in and near the storehouse of said Payne and Son for the purpose of capturing defendant and one William Hill, if they should break into the store. About eleven or twelve o'clock of that night de-

defendant and Hill came, sat down on the wall-curb and talked a short time, and then went to a window of the warehouse attached to the store. Defendant raised the window about six inches, when Hill helped him break the catch, and raised the window so a man could go in. Defendant assisted Hill in through the window. The latter handed out to the former a piece of bacon (side meat), weighing forty-five pounds. Defendant asked that more meat be handed out, but this was all that was taken. Defendant then assisted Hill out of the window and picked up the meat, which was in a gunny-sack, and they both started off. When they got fifteen or twenty steps away, they were halted and some shots were fired. They both ran, and the defendant threw the meat down, and was captured a short distance from the store. He denied being at the store. Hill was not arrested at all. Hill was the step-son of A. Payne, Sen., and the half-brother of A. Payne, Jr.

It further appears that defendant, about a week before the alleged burglary, proposed to Hill to go with him and break into and rob Payne's store. Hill notified "Enoch Van Wye and John E. Senate, of the anti-horse-thief association of Boynton, Missouri, of Hayes's proposition." On the night of June 1, 1886, Hill met defendant about half a mile from the store, whence they went and broke in, as above stated. A. Payne was not sworn as a witness, but A. Payne, Jr., one of the proprietors of the store, testified that he watched the store that night, expecting that defendant and Hill would come, break into it, and steal, but that he gave no consent for them to enter the store. He had been informed by Van Wye that these parties were expected there that night, and he, with others, watched to capture them if they did come. Frank Van Wye and James Yardley testified that they had been informed by Enoch Van Wye and John E. Senate that defendant and Hill were expected there that night, and they guarded the store to capture them if they did come.

The defendant called Enoch Van Wye and Senate as witnesses, who corroborated the state's witnesses in all essential particulars. Defendant also read the deposition of William Hill, who had moved to Kansas in the mean time. Hill stated, in substance, that defendant proposed to him to rob the store in question about a week before June 1, and he met defendant, and they went and broke into it as stated above. He informed Enoch Van Wye and Senate of defendant's proposition. He

said the Paynes did not consent for him to enter the store. He testified as follows:—

“Q. Who first proposed to go and rob the store in question? A. Defendant.

“Q. What was your object in going to the store in question with defendant, Hayes? A. My object was to let the anti-horse-thief association catch him burglarizing and robbing the store, as he had the reputation of being a desperate character.”

The only question of importance before us grows out of the instructions of the court to the jury. The court gave a lengthy charge to the jury, and refused several declarations of law asked by defendant. It will not be necessary, however, to present the question involved, to do more than copy the following instruction given by the court: “The jury are further instructed that William Hill is not on trial in this case, and that although the jury may believe from the evidence that said Hill did not break and enter the storehouse of A. Payne and Son with the felonious intent to steal therefrom, yet if they further believe from the evidence, beyond a reasonable doubt, that the defendant was present and assisted said Hill in breaking and entering said store, and taking therefrom a side of meat, of any value whatever, with the felonious intent to convert said meat to his own use, then, in that case, the defendant is guilty of burglary, and the jury ought to so find.”

It will be seen the trial court told the jury in this instruction that defendant was guilty of burglary if he, with a felonious intent, assisted and aided Hill to enter the building, notwithstanding Hill himself may have had no such intent. In this we think the court erred. One cannot read this record without being convinced beyond a reasonable doubt that Hill did not enter the warehouse with intent to steal. He was the step-son of the senior and the half-brother of the junior member of the firm of A. Payne and Son, and all the evidence shows that he engaged in the enterprise for the sole purpose of enabling the parties on guard to capture the defendant, and that this purpose on his part was well known to the owners of the store. We may assume, then, for the sake of the argument, that Hill committed no crime in entering the wareroom.

The act of Hill, however, was by the instruction of the court imputed to defendant. This act, according to the theory of

the instructions, so far as Hill was concerned, was not a criminal act, but when it was imputed to defendant it became criminal, because of the latter's felonious intent. This would probably be true if Hill had acted under the control and compulsion of defendant, and as his passive and submissive agent.

But he was not a passive agent in this transaction. He was an active one. He acted of his own volition. He did not raise the window and enter the building with intent to commit crime, but simply to entrap defendant in the commission of crime, and have him captured. Judge Brewer sets this idea in a very clear light in *State v. Jansen*, 22 Kan. 498. He says: "The act of a detective may, perhaps, be not imputable to the defendant, as there is a want of community of motive. The one has a criminal intent, while the other is seeking the discovery and punishment of crime." Where the owner learns that his property is to be stolen, he may employ detectives and decoys to catch the thief. And we can do no better than to quote again from Judge Brewer, in the case above cited, as to the relation of the acts of detectives and the thief, when a crime is alleged to have been committed by the two. He says: "Where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt, or what acts done by the party who is with him, and apparently assisting him. Counsel have cited and commented upon several cases in which detectives figured, and in which defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them, that some act essential to the crime charged was in fact done by the detective, and not by the defendant; and this act not being imputable to the defendant, the latter's guilt was not made out. The intent and act must combine; and all the elements of the act must exist, and be imputable to the defendant."

Applying the principle here announced to the case at bar, we find that defendant did not commit every overt act that went to make up the crime. He did not enter the warehouse, either actually or constructively, and hence he did not commit the crime of burglary, no matter what his intent was, it clearly appearing that Hill was guilty of no crime. To make defendant responsible for the acts of Hill, they must have had a common motive and common design. The design and the motives of the two men were not only distinct, but dissimilar, even antagonistic. In support of the doctrine announced in

State v. Jansen, 22 Kan. 498, which seems eminently just and humane, and in support of the rule we have applied in this case we cite *Speiden v. State*, 3 Tex. App. 156; 30 Am. Rep. 126; and cases cited in principal case and note; 1 Bishop's Crim. Law, sec. 262, and cases cited; 1 Wharton's Crim. Law, secs. 149, 766, 770, 919, and cases cited; article in 25 Alb. L. J. 184, and cases cited.

These citations sufficiently show the relation a detective or decoy bears to the alleged criminal and the criminal act. There is a feeling in society, and indeed inheres in our very nature, against detective methods in the discovery and punishment of crime. These methods may be often necessary, and in extreme cases commendable, but yet the sentiment of mankind is against them. And why should it not be? Hill testified in this case that a long time prior to the alleged burglary, defendant requested him to join him in a general scheme to steal, and about a week prior thereto he suggested the crime with which he was charged and of which he was convicted. What was Hill's plain duty, under the circumstances, as a citizen and neighbor? It was to condemn the project, and in the strongest and most emphatic terms possible. A courageous and indignant denunciation of the suggestion at the time might have turned defendant into the path of honesty, and it is almost certain this case would never have been in court. He betrayed the defendant. He made the defendant believe he was engaging in the burglary and theft, whereas he was simply engaged in it to capture and convict the defendant. The fact that defendant may have been regarded as an old offender can be no excuse, much less a justification, for Hill's conduct. If he was an old offender, the greater the reason there would seem to be why he should not be actively assisted and encouraged in the commission of a new crime, which could in no way throw light on his past offenses. "Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another, and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime, and opportunities for the commission thereof, would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction": *Saunders v. People*, 38 Mich. 218.

Hill committed no crime, and intended to commit none, but

he played a false part. He seemed to be what he was not in fact. And deep down in the hearts of all right-thinking men and women there is a feeling against such conduct as his. These remarks are made to show the injustice of imputing to defendant the acts of Hill, done under such circumstances and actuated by such motives. Bishop, in his work on criminal law, section 262, says: "If a man suspects that an offense is to be committed, and instead of taking precautions against it, sets a watch, and detects and arrests the offenders, he does not thereby consent to their conduct or furnish them any excuse. In such case he remains passive, and the offenders do every overt act necessary to constitute the crime. That is not like this case. Here Hill met defendant a half-mile from the store. They proceeded to the place, and sat down on the well-curb and talked a while. They then went to the window, and Hill entered the house while defendant stood on the outside. He did not commit the overt act of entering the wareroom and stealing, and Hill's act, not being criminal, cannot be imputed to defendant as a criminal act on the ground that he supposed Hill was in fact stealing.

Our ruling is, that defendant cannot be convicted of burglary and larceny, unless he committed the crimes himself, or was present, aiding and abetting another in their commission, that other acting with a felonious intent. The court should instruct the jury that if Hill broke into and entered the wareroom with a felonious intent, and defendant was present, aiding him, with the same intent, then he is guilty; but if Hill entered the room with no design to steal, but simply to entrap defendant, and capture him in the commission of crime, and defendant did not enter the room himself, then he is not guilty of burglary and larceny as charged. He may be found guilty, however, of petit larceny, in taking and removing the bacon after it was handed to him. This overt act he did in fact commit. And while he may not be guilty of the burglary or grand larceny accompanying a burglary, yet he may be convicted of that which he does commit: *Regina v. Johnson*, 41 Com. B. 123; *Rex v. Eggington*, 2 Bos. & P. 508; 2 East P. C. 666, 667.

Indeed, we think this is the only crime he did commit. But it is a question of fact whether Hill entered the store with a felonious intent or not, to be submitted to and determined by the jury; and while the court should submit this question to the jury, it should also submit the other hypothesis, and

that is, if Hill committed no crime, and defendant did not enter the room, then, whether defendant was guilty of petit larceny in taking and removing the meat, with intent to steal it, after it was handed out to him. As this case will have to be retried, we will remark that if the court should use the word "felonious" in the instructions, it should define it.

The judgment is reversed, and the cause remanded for new trial.

CRIMINAL LAW — BURGLARY — DECOYS. — A banker, suspecting defendant of the intention to rob his bank, employed detectives to act as decoys, and induce him to enter the bank. The defendant could not be convicted of burglary, since the consent of the detectives was the consent of their employer: *Speiden v. State*, 3 Tex. App. 156; 30 Am. Rep. 126, and extended note.

HOPE v. BLAIR.

[105 MISSOURI, 85.]

JUDGMENT, WHEN VOID. — When it appears from the whole record that a court has no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in collateral proceedings.

JUDGMENT — JURISDICTION. — **THE SUBJECT-MATTER OF A SUIT**, when reference is made to matters of jurisdiction, means the nature of the cause of action and the relief sought.

JURISDICTION MAY BE DEFINED to be the right to adjudicate concerning a subject-matter in a given cause. To constitute this, there are three essentials: 1. The court must have cognizance of the class of cases to which the one adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be in substance and effect within the issues.

JURISDICTION OF THE SUBJECT-MATTER OF A SUIT EXISTS when the court has the right to proceed and determine the controversy or question in issue between the parties, and to grant the relief prayed, and what that controversy or issue is must be determined by the pleadings.

JUDGMENT AGAINST A MARRIED WOMAN and her husband, establishing and enforcing her alleged liability against her separate estate, when the record shows that she held lands as such estate, is conclusive in a collateral action, and precludes any inquiry in such action as to whether the court erred in law or in fact.

LIEN PENDENS. — The filing of a notice of the pendency of an action gives constructive notice from the date of such filing, and one who thereafter purchases property which is subject to the action cannot be regarded as an innocent purchaser.

PRIORITY BETWEEN ATTACHMENTS AND UNRECORDED CONVEYANCES. — Until a sale has been made under a judgment or attachment, the lien acquired by it is subject to all prior unrecorded deeds and equities existing against the land. The lien of an attachment or judgment does not extend beyond the actual interest of the debtor at the time of the rendition of the judgment or the levy of the attachment.

A PURCHASER BY A QUITCLAIM DEED FOR VALUE acquires title as against every prior unrecorded deed and every instrument in writing which may be recorded whereby the real estate conveyed may be affected in law or in equity; but equities which arise from transactions or a state of facts not required to be in writing or recorded are not cut off by a quitclaim deed.

ESTOPPEL TO OBJECT TO THE ADMISSION OF EVIDENCE. — Though the loss of an original deed is not so proved as to warrant the admission of evidence of a copy, yet if the party assigning as error the reception of such copy in evidence himself claims a right of possession necessarily based on the original deed, this is a sufficient acceptance of the ruling of the court to estop him from denying that it was properly in evidence before the court.

DAMAGES IN AN ACTION OF EJECTMENT MAY INCLUDE THE RENTS AND PROFITS ACCRUING AFTER THE COMMENCEMENT OF THE ACTION, down to the time when the assessment of damages is made.

W. O. L. Jewett and C. M. King, for the appellants.

R. P. Giles, for the respondent.

MACFARLANE, J. Ejectment to recover possession of the east half of lot 9, in Taylor and Towson's addition to Shelbina. Answer, general denial.

It was admitted on the trial that Julia A. Wilson, wife of Newton Wilson, was the common source of title, and that defendant was, at the commencement of the suit and at the trial, in the possession of the property.

Plaintiff offered in evidence the records and proceedings of the circuit court of Shelby County, in a suit by plaintiff herein as guardian of some minor children against Julia A. Wilson and her husband, commenced on the fourth day of February, 1885. This record shows that on the seventeenth day of August, 1883, Julia A. Wilson was the owner of the land as her separate estate in equity, and on said day she executed and delivered to plaintiff, as guardian, her note for five hundred dollars, intending to charge, and thereby charging, said land for the payment thereof. Personal service was had on defendant Julia A., and notice by publication on her husband. Notice of *lis pendens* was filed on the day the suit was commenced, and was duly recorded. The court found the facts to be as charged in the petition, and a decree was entered accordingly. Under a sale on execution upon this decree, plaintiff purchased the land, and claims title under the sheriff's deed, which was read in evidence. Plaintiff offered evidence of damages, rents and profits, and rested.

Defendant then read in evidence a deed from Newton Wilson and wife, conveying the lot in controversy to John T.

Hopkins, dated August 28, 1884, filed August 28, 1884. Also note and all the papers in an attachment suit brought January 7, 1885, by defendant Berolzheimer against John T. Hopkins, in which the lot in controversy was attached, judgment obtained, and sale of lot under same. Sheriff's deed also read conveying lot to Berolzheimer; sale under this attachment regular; deed dated April 7, 1886. Defendant next read the record of a deed from S. C. Gunby and wife to Julia A. Wilson, dated July 27, 1883, and filed August 20, 1883. This is a warranty deed in usual form, conveying simply a legal title, with no statement in reference to a separate estate.

Then defendant read a deed from Julia Wilson and husband to Samuel Kennerly, dated January 3, 1885; filed April 9, 1885. This was a quitclaim deed, and contained the following recital: "It is hereby understood by and between the parties hereto that this deed is made subject to a certain deed of trust in favor of George Hope, given by Julia A. Wilson in August, 1883, to secure the payment of five hundred dollars."

Then defendant read deed from Samuel Kennerly and wife to Berolzheimer, dated April 7, 1886; filed April 12, 1886.

In rebuttal, plaintiff offered to read the record of a deed from J. T. Hopkins and wife to Julia A. Wilson, dated December 25, 1885, and filed the same day. This record was objected to as evidence, for the reason that the deed did not appear to have been acknowledged. To prove the execution of the deed, plaintiff called L. A. Hayward, who testified that he was deputy recorder, and knew the handwriting of J. T. Hopkins. When asked if he knew of the filing of a deed by him on December 25, 1884, from him and wife to Julia A. Wilson, he answered: "I think the deed came by mail. I recorded the deed. My recollection is, it was his handwriting and signed by him; that he had made search for the original deed and could not find it; might have sent it to Shelbina to a man named Jordon. In my judgment, this is the deed. Signature to deed my recollection is was 'Hopkins.'"

Upon this proof the court permitted the record to be read as a copy of a lost deed. This deed contained the same recital as the deed to Kennerly. Plaintiff proved that at the date of the note, August 19, 1883, Julia A. Wilson was in possession of the property.

1. Defendant contends that the only title to the lot shown to have been held by Julia A. Wilson at the time the note sued

upon was executed by her was a simple legal estate, which could not be charged for debts contracted by her, and for that reason the note was void, and the court never had jurisdiction over the subject-matter of the suit, and the decree, sale, and deed were all void, and no title to the lot passed to plaintiff thereunder.

There can be no doubt that when it appears from the whole record that the court had no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding: *Adams v. Cowles*, 95 Mo. 507; 6 Am. St. Rep. 74; *Brown v. Woody*, 64 Mo. 548; *Higgins v. Peltzer*, 49 Mo. 155. It is not contended in this case that the court had no jurisdiction of the person of Mrs. Wilson or her husband. The record shows that the former was personally served and the latter was notified by publication. The inquiry is therefore narrowed down to the question whether the court had jurisdiction of the subject-matter of the suit and to decree a sale of the property.

The circuit courts of this state have all general common-law jurisdiction, which is not conferred upon another court or tribunal. It has, therefore, jurisdiction to hear and determine all questions which affect the rights and liabilities of married women with respect to charging their separate estate upon their contracts. The general equity jurisdiction in such suits is not questioned, but the contention is, that the court had no jurisdiction of the subject-matter of this particular suit, for the reason, as stated, that the estate which the decree attempted to charge was not the separate estate in equity of the married woman.

The subject-matter of a suit, when reference is made to questions of jurisdiction, is defined to mean "the nature of the cause of action and of the relief sought": *Cooper v. Reynolds*, 10 Wall. 816. "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this there are three essentials: 1. The court must have cognizance of the class of cases to which the one adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue": *Munday v. Vail*, 84 N. J. L. 422.

A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties

or grant the relief prayed. What the controversy or issue in any case is can only be determined from the pleadings. When the court has cognizance of the controversy as it appears from the pleadings, and has the parties before it, then the judgment or order which is authorized by the pleadings, however erroneous, irregular, or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the "soundest principles of public policy." "It is one," says the court of Virginia, "which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may, in another suit, inquire into the irregularities or errors in such judgment, there would be no end to litigation, and no fixed established rights": *Lancaster v. Wilson*, 27 Gratt. 624. See also *Adams v. Cowles*, 95 Mo. 506; 6 Am. St. Rep. 74; *Rosenheim v. Hartsock*, 90 Mo. 365; *Morris v. Gentry*, 89 N. C. 248; *Porter v. Gile*, 47 Vt. 620; *Paul v. Smith*, 82 Ky. 451; 1 Black on Judgments, sec. 245.

As is said in *Adams v. Cowles*, 95 Mo. 506, 6 Am. St. Rep. 74, "the question of jurisdiction must be tried by the whole record." An examination of this record shows that Mrs. Wilson held the land as her separate estate when she executed the note. Such was also the finding of the court. The decree was in accordance with the pleadings. The court unquestionably had jurisdiction of the subject-matter. Inquiry cannot be made in this collateral proceeding whether the court committed error, either in law or fact; the judgment is conclusive. There is not a suggestion found in the record that raises a suspicion that the property to be affected was other than the separate estate of Mrs. Wilson.

2. The next inquiry is, whether defendant was an innocent purchaser without notice of plaintiff's equitable right or charge upon this land. The notice of *lis pendens*, which was duly filed and recorded, gave constructive notice from the day of its filing, which was the day the suit was commenced: *Rosenheim v. Hartsock*, 90 Mo. 357.

On the question of notice, the court, in substance, declared the law to be, that if defendant Berolzheimer, prior to his purchase under the attachment proceedings and the deed from Kennerly, both dated April 7, 1886, had notice of the

deed from Hopkins to Mrs. Wilson, then he was a purchaser with notice of plaintiff's equity, and the title acquired was subject thereto. The court found that defendant had such notice of the prior deed from Hopkins to Mrs. Wilson. The correctness of the instruction depends upon whether the rights defendant acquired under the attachment deed and the deed from Kennerly dates from the levy of the attachment and the date of the deed from Mrs. Wilson to Kennerly, or from the date of the sheriff's deed under the attachment and the deed from Kennerly to himself, viz., April 7, 1886; if the latter, then the instruction is correct.

There is no doubt the instruction correctly declared the law as applied to the sale under the attachment proceedings. Until a sale has been made under a judgment or attachment, the lien acquired under them is subject to all prior unrecorded deeds and equities existing against the land: *Maupin v. Emmons*, 47 Mo. 305; *Black v. Long*, 60 Mo. 182; *Martin v. Nixon*, 92 Mo. 30.

The principle established by these cases, and many others in this state, and upon which they rest, is, that the lien of a judgment or attachment does not exceed the actual interest the debtor had in the land at the time of the rendition of the judgment or levy of the attachment: *Davis v. Ownsby*, 14 Mo. 171; 55 Am. Dec. 105. The recorded notice of *lis pendens* was constructive notice to defendant of the equitable claim on the land, and his purchase was subject thereto.

3. Whether the instruction correctly applied the law to the purchase of Kennerly is more in doubt, but we are of the opinion it does. A purchaser by quitclaim deed for value will acquire the title as against a prior unrecorded deed, and every instrument in writing which may be recorded whereby the real estate conveyed may be affected in law or equity. This rule results from the operation of sections 692 and 693 (Rev. Stats. 1879) of the registry act, which invalidates the prior deed if not recorded: *Munson v. Ensor*, 94 Mo. 506, and authorities cited.

Equities which arise from transactions or a state of facts which may not be required to be in writing or recorded, if in writing, are not to be cut off by a quitclaim deed. As to them it only has an operation, co-extensive with its terms, of releasing such rights and interests as the grantor has at the time of the conveyance. The land in the hands of the purchaser remains subject to such equities: *Ridgeway v. Holli-*

dry, 59 Mo. 444; *Munson v. Ensor*, 94 Mo. 506; *Mann v. Best*, 62 Mo. 497; *Stoffel v. Schroeder*, 62 Mo. 147. Kennerly then took his title from Mrs. Wilson, subject to plaintiff's equities. The instruction was correct, and the finding that defendant had notice when he purchased was authorized by the evidence.

4. It was objected that a proper foundation was not laid for the introduction in evidence of the copy of the deed from Hopkins to Mrs. Wilson. Sufficient proof was made of an executed original and that the record read was a true copy; but before the copy was admissible, it was necessary to account for the non-production of the original: *Hardin v. Lee*, 51 Mo. 241; *Attwell v. Lynch*, 39 Mo. 519; *Perry v. Roberts*, 17 Mo. 36.

Loss of the original deed was not sufficiently proved to authorize the reading of the copy, but we do not think defendant can now avail himself of the omission. Defendant offered and read in support of his own title the deed from Mrs. Wilson to Kennerly, and from Kennerly to himself. Under this chain of title he claimed the right of possession, not only in the circuit court, but again in his brief and argument here. This we think a sufficient recognition and acceptance of the ruling of the court to estop him to deny that the deed was properly in evidence before the court. This deed was necessary to complete the title asserted through the conveyance from Kennerly, and defendant cannot claim title under it and deny it at the same time: *Brown v. Bowen*, 90 Mo. 190; *Bigelow on Estoppel*, c. 26, p. 717; *Orrick v. Durham*, 79 Mo. 178.

5. It is also urged that the damages assessed are in excess of the amount claimed in the petition. Plaintiff claimed in his petition damages to the amount of one hundred dollars and accruing monthly rents and profits at ten dollars. The judgment for damage was \$160. The suit was commenced in September, 1886, and the judgment was rendered in October, 1888. The evidence tended to prove the monthly value of the rents to be from seven to nine dollars. The statute (sec. 4638) allows a recovery, "by way of damages, the rents and profits down to the time of assessing the same." It was sufficient under the statute to state in the petition the value of the rents and profits.

Under such statement, the rents and profits should be assessed from the commencement of the suit to the trial, and the amount found would be a part of the damages claimed in the petition. This amount, added to the damage which ac-

crued prior to the institution of the suit, would constitute the whole damages "claimed in the petition": *Cape Girardeau etc. Road Co. v. Renfro*, 58 Mo. 286.

No error being found that could affect the merits of the case, the judgment is affirmed.

JUDGMENT VOID FOR WANT OF JURISDICTION. — A judgment is void, and will be so treated in a collateral proceeding, when from an inspection of the record it appears that the court had no jurisdiction over the person or of the subject-matter: *Arthur v. Isaac*, 15 Cal. 147; 22 Am. St. Rep. 381, and note; *Freeman on Judgments*, secs. 117, 120; *Witherson v. Schoenmaker*, 77 Tex. 615; 19 Am. St. Rep. 803; *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752; *Lyons v. Roach*, 84 Cal. 28; *Paxton v. Daniell*, 1 Wash. 12.

JURISDICTION — DEFINITION. — Jurisdiction "is authority or power which a man hath to do justice in causes of complaint brought before him": *Borden v. State*, 11 Ark. 519; 54 Am. Dec. 218.

LIS PENDENS — BONA FIDE PURCHASERS. — A purchaser pendente lite is always treated as a purchaser with notice: *Keller v. Stanley*, 20 Ky. 240; *Powell v. Campbell*, 20 Nev. 232; 19 Am. St. Rep. 350, and note; *Dwyer v. Hippotoc*, 72 Tex. 520; *Stevenson v. Edwards*, 98 Mo. 622; *Hart v. Steadman*, 98 Mo. 452; *Cassidy v. Kluge*, 73 Tex. 154; *Spencer v. Credle*, 102 N. C. 68; *Collingwood v. Brown*, 106 N. C. 362; *Wallace v. Marguette*, 20 Ky. 131; *Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253; *Houey v. Elliott*, 118 N. Y. 125. Notice of *lis pendens* commences to run from the date of the service of process upon the defendant: *Staples v. White*, 88 Tenn. 30; or from the date of his appearance, when no process has been served: *Franklin Sav. Bank v. Taylor*, 131 Ill. 376. Notice by *lis pendens* may be actual: *Wisconsin etc. Ry Co. v. Wisconsin etc. Land Co.*, 71 Wis. 94; or constructive: *Staples v. White*, 88 Tenn. 30. Personal notice by *lis pendens* may be proved against a purchaser of mortgaged property after the commencement of a foreclosure suit: *Wiss v. Griffith*, 78 Cal. 152. The rule of notice by *lis pendens* can never apply with reference to a suit in which the court has no jurisdiction of the subject-matter: *Benton v. Shafer*, 47 Ohio St. 117. See extended note to *Newman v. Chapman*, 14 Am. Dec. 774-779.

ATTACHMENT — LIEN. — The lien of an attachment does not extend beyond the interest of the debtor in the land: *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381. As to the origin and general nature of an attachment lien, see note to *Franklin Bank v. Buckholder*, 30 Am. Dec. 606-611. An unrecorded deed has been held to be effectual as against a subsequent attachment of the land as the property of the grantor: *Marrow v. Gruesz*, 77 Cal. 218.

QUITCLAIM DEEDS — RIGHTS OF GRANTERS UNDER. — A quitclaim deed, duly recorded, to a purchaser in good faith for a valuable consideration, without notice, and after an examination of the records and the exercise of reasonable diligence to discover outstanding interests, will prevail over a prior unrecorded deed: *Merrill v. Hutchinson*, 45 Kan. 59; 23 Am. St. Rep. 713, and note; *Wbereole v. Rankin*, 102 Mo. 488; see also note to *Johnson v. Williams*, 1 Am. St. Rep. 247, 248.

EJECTMENT — RENTS AND PROFITS. — In real actions, damages may be recovered up to the time of the verdict: Note to *Cooks v. England*, 22 Am. Dec. 631, 632. One recovering land by an action of ejectment is entitled to

the crops planted after the commencement of the action: *McLean v. Bover*, 24 Wis. 295; 1 Am. Rep. 185. But see *Page v. Fowler*, 39 Cal. 412; 2 Am. Rep. 462. From the time of demise till plaintiff is put into possession, defendant, in an action of ejectment, must account for the rents and profits of the land: *West v. Hughes*, 1 Harr. & J. 574; 2 Am. Rep. 539. Compare *Hare v. Fury*, 3 Yeates, 13; 2 Am. Dec. 358. Rents and profits are not recoverable from a *bona fide* holder of land, except from judicial demand, when evicted: *Miller v. Skumaker*, 42 La. Ann. 399. A defendant in an action of ejectment cannot avoid responsibility for rents and profits by showing that he had abandoned possession to another, and was not therefore himself in possession: *Vicksburg etc. R. R. Co. v. Lewis*, 68 Miss. 29.

DILLON v. HUNT.

[105 MISSOURI, 154.]

INDEPENDENT CONTRACTOR, LIABILITY FOR NEGLIGENCE OF. — If a proprietor undertakes to do upon his lot that which is dangerous in its nature to adjacent proprietors, he must use reasonable care to prevent the doing of an injury to them, whether he does the work himself or procures it to be done by an independent contractor.

LOT-OWNER'S LIABILITY FOR WALL FALLING, THROUGH NEGLIGENCE. — If the owner of a lot procures a contractor to enter thereon for the purpose of removing a wall, which through the negligence of the contractor is caused to fall upon and injure the adjacent premises, the lot-owner is liable for the damages thus occasioned.

EVIDENCE — PRACTION. — Evidence of an agent of an owner of a lot that he made no contract for any one to remove a wall therefrom, and did not know it was being removed, is not admissible in an action against the lot-owner for damages resulting from negligence in the removal, when there is evidence tending to show that such removal was done with the previous knowledge and assent of such owner.

DAMAGES RECOVERABLE FOR A WRONG are not diminished by the fact that the party injured has been partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrong-doer did not contribute.

PLAINTIFFS were merchants occupying a building in St. Louis, adjacent to which was another building belonging to Charles L. Hunt. This latter building took fire, and the combustible parts of it were destroyed thereby. Its owner was notified that the walls, which remained standing, were dangerous, and must be removed. He afterwards permitted persons to attempt the removal, and through their negligent management, parts of the wall were thrown upon the building occupied by plaintiffs, and thereby it was crushed and their goods damaged. These goods were insured against damage by fire and water, and the plaintiffs received some indemnity from the insurance thus effected. They brought

this action against the owner of the lot, who died during its pendency. The court, with respect to the questions arising out of the insurance of the property, declared the law to be as follows: "2. The jury are instructed, if they find from the evidence that the plaintiffs, under the name of T. E. Dillon, had insured the stock of goods injured by the falling of the walls of Hunt's building, and claimed and collected from the insurance companies, or any of them, damages to such stock caused by the falling of the walls as a result of the fire, then the jury are authorized and directed to deduct from the gross damages, if any, which the jury may believe the plaintiffs have sustained in consequence of the falling of the wall, the amount of such damages as plaintiffs are shown to have collected from said insurance companies occasioned by the falling of the wall." The jury returned a verdict for the defendant.

C. P. and J. D. Johnson, for the plaintiffs.

Noble and Orrick, for the defendant.

GANTT, P. J. When this cause was here on the former appeal, this court affirmed the judgment of the St. Louis court of appeals in reversing the judgment of the St. Louis circuit court. Without repeating at length the grounds upon which the court of appeals held plaintiff would be entitled to recover, it is sufficient to state that it was then held and supported by the authorities that where a proprietor undertakes to do that upon his land which is in its nature dangerous to adjoining proprietors, he must use reasonable care to work no trespass upon their possession, and it is immaterial in such a case whether the work be done by the proprietor or by an independent contractor: *Dillon v. Hunt*, 11 Mo. App. 246.

So on the trial of this cause, the court instructed the jury that if plaintiffs' goods were destroyed by the falling of a brick wall then standing on the adjoining lot of Charles L. Hunt, the present defendant's testator, that said wall was caused to fall upon the storeroom in which plaintiffs' goods were by and through the negligence of certain persons who went upon said premises for the purpose of taking down said wall by and with the knowledge and consent of said Hunt, and that said Hunt then and there had the custody and control of the premises upon which said wall stood, then plaintiffs were entitled to recover of said Hunt's estate.

It will be seen at once that one of the most material facts necessary to plaintiffs' recovery was the privity of Hunt with the parties who were pulling down the wall; and plaintiffs offered the direct evidence of Mr. Sexton, the chief of the fire department, tending to show his official notice to Mr. Hunt of the dangerous condition of the wall, and directing him to have it taken down, and of Mr. Fruin of Mr. Hunt's desire to have him bid on the work of removing the wall, and his recollections of the men who did the work.

On the part of the defendant the court permitted Fred Ziebig to testify that he was Hunt's agent for the collecting of the rents, etc., of this building, and that he, Ziebig, made no contract with anybody to remove the wall; and that he did not know the walls were being taken down. To this evidence plaintiffs objected at the time, and saved their exceptions. It was clearly incompetent.

It was wholly irrelevant whether Ziebig knew anything about the matter. Mr. Hunt was the owner. It was shown beyond peradventure that he was in the city the day after the fire; talked with Sexton in the immediate view of the wall; was notified then by Sexton at the time to have it removed on account of its danger. In Hunt's absence, notice to Ziebig might, under some circumstances, have become notice to Hunt, but notice to Hunt need never have become notice to Ziebig, as, under the facts, it was wholly immaterial whether Ziebig had notice.

Again, the court, over the objection of plaintiffs, permitted Munson, the insurance agent, to testify that he told Hunt not to pull down the wall. This conversation, as to plaintiffs, was *res inter alios acta*. It had nothing to do with plaintiffs' rights, nor could it in the least affect Hunt's responsibility. The admission of this evidence of Ziebig and Munson, tending to show want of notice in Hunt, was clearly erroneous.

But the most serious error committed on the trial was the giving of the second instruction on behalf of defendant, set forth in full in the statement of this cause, and the subsequent instruction reiterating the same idea given by the court of its own motion. That instruction permitted the jury, in assessing plaintiffs' damages, to reduce the same by the amount of any insurance money they might believe from the evidence plaintiffs had received for losses occasioned by the falling of the wall on their goods. If plaintiffs' goods were damaged by the negligence of Hunt or his employees, it was

no concern of theirs that plaintiffs were insured, and all the evidence of his insurance was irrelevant and incompetent, and the instruction allowing this insurance as mitigating the damages of plaintiffs was erroneous.

Few propositions have been so universally accepted and settled as this.

Sutherland on Damages lays down the rule as follows: "There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. A man who was working for a salary was injured on a railroad by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant, sued for such injury, in mitigation. Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow a wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium": 1 Sutherland on Damages (1882), p. 242. And he is sustained by the following authorities: *Cunningham v. Evansville etc. R. R. Co.*, 102 Ind. 478; 52 Am. Rep. 688; *Weber v. Morris etc. R. R. Co.*, 35 N. J. L. 412; 10 Am. Rep. 258; *Connecticut Mut. L. Ins. Co. v. New York etc. R. R. Co.*, 25 Conn. 265; 65 Am. Dec. 571; *Hayward v. Cain*, 105 Mass. 218; *Briggs v. New York etc. R. R. Co.*, 72 N. Y. 26; *Rockingham Mut. F. Ins. Co. v. Boshier*, 89 Me. 255; 68 Am. Dec. 618; and many other cases.

That these errors contributed largely to the verdict for the defendant is almost self-evident. And to the end that they may be remedied in another trial, the judgment is reversed and the cause remanded.

MASTER AND SERVANT — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER FOR NEGLIGENCE OF: See note to *Powell v. Construction Co.*, 17 Am. St. Rep. 925. A street-railroad company is liable to one who is injured through the negligence of an independent contractor who left materials in a

dangerous position: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335; 14 Am. St. Rep. 427; see note to *Faren v. Sellers*, 4 Am. St. Rep. 264. Employers are liable for an independent contractor's negligence, if they had anything to do with the work: *Linnehan v. Rollins*, 137 Mass. 123; 50 Am. Rep. 287. A land-owner is liable to an adjacent proprietor for injuries suffered from blasting done upon the premises of the former by an independent contractor at his instance: *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408. Employers of contractors are liable for injuries received through insufficiency of structure: *Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345, and note. A corporation is liable for the negligence of its contractors: *Stone v. Chesire R. R. Co.*, 19 N. H. 427; 51 Am. Dec. 192, and extended note.

SEARS v. STONE COUNTY.

[105 MISSOURI, 236.]

COURTS, WHEN DO NOT ACT JUDICIALLY. — Each county court in Missouri is given power to transact all county and such other business as may be prescribed by law, and to audit, adjust, and settle all accounts to which the county shall be a party, and an appeal is allowed in any case in which an account, or any part thereof, is rejected; but the action of the court is not judicial, and its allowance of an account has not the effect of a judgment, and does not preclude the county from resisting an action upon an account after its allowance.

A. M. Hough and W. S. Pope, for the appellant.

Gideon and Gideon, T. L. Viles, and A. Hodges, prosecuting attorney, for the respondent.

MACFARLANE, J. This is an action on a warrant issued by order of the county court of defendant county for \$450, dated November 15, 1876, payable to F. S. Heffernan, and assigned to plaintiff July 16, 1877. The answer set up want of consideration. The records of the county court of the date of June 5, 1876, showed an order by which Heffernan was employed as an attorney to prosecute suits against the Atlantic and Pacific Railroad Company for the collection of delinquent taxes, and for his services he was to be paid a per cent of the taxes collected.

The records also show the following order under date of November 15, 1876: "Now comes F. S. Heffernan and presents his account against the county, for legal services rendered, of \$450, which is allowed by the court, and ordered that a warrant be issued for the amount."

The records of the court show no other employment of Heffernan as attorney in any matter for said county. No written contract by the county with Heffernan was made and filed.

Evidence was offered by defendant, tending to prove that Heffernan collected no taxes and performed no services under his employment, and that there was no consideration for the warrant; this evidence was admitted, over plaintiff's objection. Plaintiff was a purchaser of the warrant for value without notice of the want of consideration.

Instructions were asked by plaintiff, to the effect that the order of the county court auditing and allowing the claim of Heffernan for legal services rendered was a judicial act of the court, and that the warrant sued upon cannot, under the pleadings, be questioned. This instruction was refused. At request of defendant the court gave an instruction to the effect that if the warrant was without consideration plaintiff could not recover.

The proper determination of this case depends upon whether county courts in auditing claims and ordering warrants against the counties act in a judicial capacity, thus giving to their orders the verity and conclusiveness of judgments, or whether they act merely in the character of financial or administrative agents of the counties by which their acts entered of record have simply the force and effect of contracts which are subject to impeachment for want of consideration.

The question was directly passed upon in the case of *Reppy v. Jefferson Co.*, 47 Mo. 68. In that case the suit was against the county, upon a claim which had been previously presented to the county court for allowance, and had been rejected. It was contended that the action of the county court in rejecting the claim was an adjudication of the matter and an estoppel to the pending suit. Bliss, J., in passing upon the question, said that the defense was wholly untenable. "The county court in auditing claims against the county is but its financial agent, and not a judicial body. It represents the county, and in the numerous prosecutions against it, from the earliest times, it has never been held that a rejected claim was *res adjudicata*." See also *Marion Co. v. Phillips*, 45 Mo. 76; *Phelps Co. v. Bishop*, 46 Mo. 69.

Our attention has not been called to another case in which the question has been directly passed upon by this court, nor have we been able to find one, though expressions are found in decisions incidentally bearing on the subject which do not appear to be entirely in harmony with the foregoing cases. Thus in *International Bank v. Franklin Co.*, 65 Mo. 112, 27 Am. Rep. 261, it is said: "In consequence of these provisions

of the statute, it follows that each warrant, whether drawn on a general or special fund,—for the statute makes no distinction,—is both a judicial ascertainment and a written acknowledgment of indebtedness by the county.” Also, in *State ex rel. Watkins v. Macon County Court*, 68 Mo. 49, Norton, J., says: “We therefore think that in the ascertainment of what is due from a county and the fund out of which it is to be paid (both of which must be determined before a warrant can be drawn) the court is acting judicially”; citing the case against Franklin County, *supra*, in which he says the principle is fully enunciated. In the case first cited the court adds to what is quoted the significant language that the warrant, when issued, “is to all intents and purposes the promissory note of the county.”

The judgments, even of inferior courts, when the jurisdictional facts appear upon the face of the proceedings, are not subject to collateral impeachment for want of consideration of the matter adjudicated. The judgment is conclusive on that question: *Jeffries v. Wright*, 51 Mo. 220; *Smith v. Sims*, 77 Mo. 269. On the other hand, a non-negotiable promissory note is merely a contract between the parties, and when sued upon, is subject to any defense that may be interposed in a suit on any other contract or promise: *Smith v. Sims*, 77 Mo. 269. So it is evident that when the court says, in the Franklin County case, that the order for the issuance of a warrant is a judicial ascertainment of the amount owing by the county, it is not meant that the order of the county court has the effect and conclusiveness of a judgment.

Again, in the case of *Gammon v. La Fayette Co.*, 79 Mo. 225, Henry, J., says: “It [referring to section 5388] constitutes the county court the agent of the county to audit and settle demands against the county, and although an appeal is allowed to the circuit court from the rejection by the county court of a demand against the county, yet in the first instance it is not, strictly speaking, a suit in the county court.” In *St. Louis etc. R’y Co. v. St. Louis*, 92 Mo. 165, it is said: “These [county] courts are but the agents of the counties in the allowance of accounts.”

The jurisdiction, powers, and duties of county courts must be limited to those granted and defined by the law: *State v. Harris*, 96 Mo. 37. The constitution gives them jurisdiction “to transact all county and such other business as may be prescribed by law”: Sec. 36, art. 6. The business matters

intrusted to those courts are numerous and of great variety. In some matters their duties are undoubtedly judicial, but in most of them their duties cannot be so classed. In matters in which they act judicially, appeals may be taken from their final determination of any case: Rev. Stats. 1879, sec. 1210.

Among the others, power is given them "to audit, adjust, and settle all accounts to which the county shall be a party." The words used in conferring this power, "audit, adjust, and settle," are words commonly used in reference to settlement of accounts in simple business matters, and do not imply in any respect an adjudication of a controversy between the county and a citizen.

In auditing accounts there is no part of the proceeding which takes the form of a judicial proceeding. "No petition is filed, no parties are summoned to answer the demand, and no issues are triable by a jury, except in the court's discretion": *Gammon v. La Fayette Co.*, 79 Mo. 225. It is true, in a certain sense, they act judicially, when they decide upon claims against the counties, but not more so than the auditor or financial agent of a corporation or firm when he passes upon an account presented. It is true, also, that the right of appeal is given in case the account presented against the county, or any part thereof, be rejected: Rev. Stats., sec. 1216. This appeal is specially provided, and would be altogether unnecessary if the rejection of an account constituted a judgment. Appeals from judicial determination of cases are provided for by another section: *State v. Bollinger Co.*, 48 Mo. 478; *St. Louis etc. R'y Co. v. St. Louis*, 92 Mo. 163. The statute allowing appeals from their action in rejecting accounts could only have been intended to provide a convenient and inexpensive method for having a judicial determination of a matter about which the parties are unable to agree. That could hardly be called a judicial proceeding in which the agent of one party sits in judgment upon the rights of the others.

It has been held by this court through an unbroken line of decisions since the case of *Marion Co. v. Phillips*, 45 Mo. 75, that the action of the county court in making settlements with county officials is not judicial, but that in such cases the judges act merely as the fiscal or administrative agents of the counties: *State v. Roberts*, 60 Mo. 402; *State v. Roberts*, 62 Mo. 388; *Cole Co. v. Dallmeyer*, 101 Mo. 57; *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609. The action of

county courts in auditing accounts is given no more sanctity by the law than that exercised in making settlements with county officers, and their orders are not entitled to be clothed with superior verity.

We are not unmindful of the fact that the courts of several states have held that the acts of county and town boards, to which is committed the duty of auditing accounts, are judicial in their nature, and when within their jurisdiction have the conclusiveness of judgments: 2 Black on Judgments, sec. 532, and authorities cited. As all such boards obtain their power and jurisdiction from the laws of the states creating them, the decisions in each state must necessarily depend upon the peculiarities of such laws, and the policy of the state in making them.

We are well satisfied that the protection of the public from the mistakes, carelessness, incompetency, or misconduct of public auditing boards is best subserved by an adherence to the rule which has been adopted in this state, and followed so many years. We do not think by the decision in the Macon County case, 68 Mo. 49, that a change of the rule was intended. No reference to former contrary decisions was made; the decision was not necessary to the conclusion reached, and the authority upon which it was made was entirely consistent with former rulings, and was, we think, wholly misconstrued. Our conclusion is, that the judges of the county court, in ordering the warrant sued upon, were simply acting as the financial agents of the county, and the warrant has no more force or effect than the promissory note of the county, if authorized, would have, and was subject to the defense of a want of consideration.

Judgment affirmed.

COURTS — COUNTY COURTS — MINISTERIAL ACTS. — County courts, in approving official bonds, act in a ministerial, and not in a judicial, capacity, so that parol evidence may be admitted to show that the court had full knowledge that the name of one of the sureties on an official bond had been erased without the knowledge or consent of the other sureties: *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609. A county court cannot, even by order entered of record, ratify the void acts of one of its officers: *Heidelberg v. St. Francois Co.*, 100 Mo. 69. In the exercise of its original jurisdiction, the county court has supervision of county roads, but the circuit court may correct its errors: *Heiple v. Clackamas Co.*, 20 Or. 147.

FINCH v. ULLMAN.

[105 MISSOURI, 285.]

CORPORATIONS. — THE RIGHTFUL EXISTENCE OF A CORPORATION DE FACTO CANNOT BE CALLED IN QUESTION in a collateral proceeding.

CORPORATIONS. — A TRANSFER OF PROPERTY TO OR BY A CORPORATION DE FACTO will be held valid and binding against all persons except the state.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT BOTH PARTIES TO AN ACTION CLAIM THROUGH A COMMON SOURCE OF TITLE.

EJECTMENT — COMMON SOURCE OF TITLE. — If both parties to an action claim to have derived title from the same person, neither is required to show title in him.

ADVERSE POSSESSION FOUNDED UPON MISTAKE. — The possession of co-terminous proprietors under a mistake or ignorance of the true line, and without intending to claim beyond it, will not work a disseisin in favor of either.

B. U. Massey and Ethelbert Ward, for the appellants.

Goode and Cravens, and H. E. Howell, for the respondent.

THOMAS, J. This is an action in ejectment for a strip of land in lots 31 and 34, block 2, of the city of Springfield, fronting 18½ inches on College Street, and running back 285 feet. The petition is in the usual form, and the answer is a general denial. Judgment went against plaintiffs, and they appeal.

Plaintiffs read in evidence deeds as follows: 1. A deed from D. C. Dade to the Springfield Hotel Company, dated March 26, 1870, conveying to it a strip of land off the west side of said lots 31 and 34, fronting 120 feet on said College Street, and running back to the south line of said lot 34; 2. A deed of trust executed by the Springfield Hotel Company, dated September 6, 1871, conveying the same property to Charles Sheppard, trustee, to secure the payment of the sum of eighteen thousand dollars to the *cestui que trust* named therein; 3. A deed from Sheppard, trustee, under said deed of trust, dated September 9, 1872, conveying the same property to Crenshaw, Keet, Doling, Robertson, and Jones; 4. Intermediate deeds from these parties down to plaintiffs.

Plaintiffs also read in evidence articles of incorporation of the Springfield Hotel Company, dated March 4, 1870, which conformed in every particular to the requirements of sections 1 and 2 of article 8 of chapter 37, Wagner's Statutes of Missouri, but no certificate from the secretary of state declaring this company a corporation was shown. By these articles

of incorporation a board of directors of the company was appointed to manage its concerns.

The evidence tended to show further that a hotel known as the Metropolitan was erected on this property, the eastern wall of which was built 18 $\frac{1}{2}$ inches west from the eastern line thereof.

On April 5, 1870, said Dade conveyed to Jones, Ullman, and Robertson a strip of land in said lots fronting twenty feet on said College Street, and running back to the south line of said lot 34, and adjoining the property conveyed to the hotel company on the east. In 1877, this strip of twenty feet was sold in partition to Ludwig Ullman, one of the defendants in this case. This constituted the title of defendants. The conveyance of Dade to Jones, Ullman, and Robertson, and the partition sale to Ullman, were proved by parol without objection. It appears from the evidence that Dade, and those under whom he claimed title, had had possession of said lots 31 and 34 from 1853 to the time of the conveyances of 1870 to the hotel company, and to Jones, Ullman, and Robertson; that the hotel company and its grantees have had possession of the property conveyed by Dade to said company ever since 1870.

As to the possession of the strip of twenty feet, Ullman, being called as a witness by plaintiffs, testified as follows:—

By defendants: “Q. I will ask you if you were not in possession of that same ground that Mr. Massey asked you about more than ten years before the commencement of this suit in March 28, 1887? A. O, yes; I was.

“Q. If you were in possession of that ground continuously from March 1, 1887? A. I was in possession.

“Q. And claiming it as your own? A. My own; yes, sir.”

By plaintiffs: “Q. How were you in possession? A. I owned the house and lot. I bought it. We bought it from Mr. Dade, and I controlled it for the others,—for Mr. Jones, who owned one third, and Mr. Robertson, who owned one third, and I controlled it for them, and a sale took place by partition, and I bought it under that sale.

“Q. How many feet did you buy? A. Twenty feet. I bought between the hotel and Mr. Dade’s lot, where Mr. Ford is now.

“Q. How many feet is there between the hotel and Mr. Dade’s lot? A. I believe there is twenty-one feet.

“Q. At the time you bought that lot at the partition sale,

what was there on the lot? A. There was a sign-board across the whole lot.

"Q. Was there anything else on the lot? A. There were some boxes there, and some old wagons, and some salt-barrels against the hotel side. There was a house on the back part of the alley, 235 feet from the front. The bill-board reached from the wall of Dade's building to the hotel wall, and remained there continuously till I began to build in 1882 or 1883.

"Q. Have you lived here continuously since 1877? A. No, I moved to Cleveland, Ohio, in 1881, and lived there six years.

"Q. How do you know that bill-board was up there all the time? A. I came here once or twice, sometimes two or three times a year, and I saw it there.

"Q. Are you positive now that that bill-board stood there all the time? A. Yes."

By defendants: "Q. Did Mr. Dorsey build a platform across there in the spring of 1882 for agricultural implements? A. Yes.

"Q. Ain't you mistaken about it remaining there until you commenced to build? Wasn't it torn down when the platform was put there? A. Yes, sir."

It is not proven in so many words, but the inference from the evidence is, that defendant Ullman took actual possession of the strip of 18½ inches of land in 1882 or 1883, when he commenced to build on his property. Defendant Ullman also testified that he never heard of plaintiff's claim to the disputed strip till he built his house. This is substantially the evidence as presented by the plaintiffs, and upon that the court instructed the jury that, under the pleadings and evidence, the plaintiffs could not recover, and this presents the only question for decision.

In support of the ruling of the trial court, defendants urged that plaintiffs failed to show title to the strip of land in dispute, — 1. By failing to show title in Dade; 2. By failing to show that the Springfield Hotel Company was a duly incorporated company; and 3. By showing that defendants had acquired the title to it by adverse possession.

Per contra, the plaintiffs contend that the corporate existence of the hotel company and the deeds to and from it cannot be called in question in this collateral proceeding; that as both parties claim title to the land from Dade, — a common

source,—they were not required to show title in him, and the evidence does not show that defendants had acquired the title by adverse possession.

1. Section 1 of article 8, chapter 37, Wagner's Statutes of Missouri, authorized the incorporation of a hotel company, and the company in question having been formed *de facto*, and having assumed to act, and having acted as a corporation *de facto*, its corporate existence cannot be called in question or tested in a collateral proceeding like this: 2 Morawetz on Private Corporations, secs. 776-778; *Granby M. & S. Co. v. Richards*, 95 Mo. 106. And it is well settled that a transfer of property to or by a corporation *de facto* will be held binding and valid as against all parties except the state: 2 Morawetz on Private Corporations, sec. 753; *Thompson v. Candor*, 60 Ill. 244; *Hudson v. Green Hill etc. Corporation*, 118 Ill. 618, *Wait on Insolvent Corporations*, sec. 22.

2. The contention of defendants that plaintiffs were required to show title in Dade, in order to recover in this case, is not tenable. Defendant Ullman testified that he claimed title to the property by and through Dade. It is true, the fact that he claimed through Dade was shown by parol; but in the first place, there was no objection to this mode of proof; and in the second place, if there had been, it ought to have been overruled; for it was expressly ruled in the case of *Smith v. Lindsey*, 89 Mo. 76, that a common source of title may be shown by parol. It being shown that both parties derived title from the same person, plaintiffs were not required to show title in him.

3. This brings us to the question of the statute of limitations. This is evidently a contest between coterminous proprietors as to the boundary line between them. Plaintiffs' evidence tended to show that the conveyance by Dade to the hotel company in March, 1870, covered the disputed strip of land, and that while defendant Ullman did not pretend he had bought more than twenty feet frontage on College Street, he had at the time of trial possession of and claimed title to at least twenty-one feet. The evidence is indefinite in regard to his possession of the disputed strip. We take it, however, that there was evidence that, prior to 1882, there were bill-boards on defendants' land extending to the hotel building, Whether these bill-boards were there ten years prior to the institution of this action does not clearly appear. In 1882, Dorsey, by permission of defendants, built a platform for agri-

cultural implements. This "platform extended up against the hotel building." When this was put up the bill-boards were taken down. In 1882 or 1883, defendant Ullman built a house on his property, and then unquestionably took actual possession of the disputed strip of land. If the trial court sustained the demurrer to the evidence because it was proved that defendants had acquired title to the property in controversy by adverse possession, it committed error.

We deem the evidence of defendants' possession of the disputed strip very weak indeed, and, beyond any controversy, it was not so cogent that the court could, as a matter of law, declare to the jury defendants had acquired the title by adverse possession; for if the demurrer to the evidence was sustained on this ground, that is what the court had to do. And again, there was no evidence that defendants intended to claim, or did claim, beyond their true line. "The possession of coterminous proprietors under a mistake or ignorance of the true line, and without intending to claim beyond the true line, will not work a disseisin in favor of either": *Crawford v. Ahmes*, 103 Mo. 88. Plaintiffs' evidence showed a *prima facie* right of recovery, and the court erred in sustaining a demurrer to it.

The judgment is reversed and the cause remanded.

CORPORATIONS — LEGALITY OF EXISTENCE — COLLATERAL ATTACK. — The legality of the organization of a railroad corporation cannot be attacked in a collateral proceeding: *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240, and note. One who executes a note payable to a corporation cannot deny its existence at that time: *Jones v. Bank of Tenn.*, 8 B. Mon. 122; 46 Am. Dec. 540, and note. See extended note to *Hildreth v. McIntire*, 19 Am. Dec. 67. The legality of the organization and existence of a corporation *de facto*, and its power to hold and convey property, cannot be collaterally drawn in question: *Saunders v. Farmer*, 62 N. H. 572; *Ontario etc. Bank v. Tibbatts*, 80 Cal. 66; *Boose v. Gulf etc. Co.*, 24 Fla. 550.

CORPORATIONS — POWER TO TAKE AND TRANSFER PROPERTY. — A corporation can make a valid sale of its real and personal property: *State v. Western etc. Canal Co.*, 40 Kan. 96; 10 Am. St. Rep. 166, and note; *Warfield v. Marshall Co. etc. Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263, and note. At common law, corporations have a legal capacity to take the fee to realty: *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378, and note; *In re McGraw*, 111 N. Y. 66; *Kendall v. Bishop*, 76 Mich. 634. Whether a corporation has exceeded its powers in accepting a deed to real estate can only be raised by the state: *Ragan v. McElroy*, 96 Mo. 349.

LEGAL TITLE TO LAND CANNOT BE PROVED BY PAROL EVIDENCE in an action of ejectment: *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531, and note.

EJECTMENT — COMMON SOURCE OF TITLE. — If both parties in ejectment claim under common title, it is sufficient to show a derivative title from the common grantor without proving his title: *Merchants' Bank v. Harrison*, 30 Mo. 433; 93 Am. Dec. 285, and note; *Doe v. Dugan*, 8 Ohio, 87; 31 Am. Dec. 432, and note; *Bishop v. Truett*, 85 Ala. 376; *Glover v. Thomas*, 75 Tex. 506.

POSSESSION TAKEN AND HELD THROUGH IGNORANCE OR MISTAKE. — Not only are the authorities conflicting in respect to the effect of a possession of real property taken and held through a mistake as to the true location of the boundary line, but the decisions made in the same state are sometimes, if not in conflict in their statement of the legal principles to be applied, difficult to reconcile when they apply such principles to the existing facts. In truth, the statement of the rule, as expressed in the principal case and others, necessarily leads to doubt and difficulty in its application. It is there said that possession under a mistake or ignorance of the true line, without intending to claim beyond it, will not work a disseisin. But, because of his mistake and ignorance, the party taking possession has no intent, unless it is an intent to take and hold his own land. He does not know that there is any question about the line, and therefore he never considers or forms any intent whatever respecting, what he will do when he finds out that he has taken possession beyond that line. Such intent as he has is, undoubtedly, to hold the land of which he possesses himself; but it is an intent arising from mistake and ignorance, and when they are subsequently discovered, the true question is, whether the intent arising from his belief in one state of facts shall be applied when an entirely different state of facts is made to appear.

The first American case in which this question arose was a writ of entry for a certain lot 4, of part of which the defendant had taken possession under a conveyance to him of the adjacent lot, No. 3. After this taking of possession, a conveyance of lot 4, under which plaintiff claimed, was made, and the defendant insisted that because of his adverse possession when such conveyance was made, it must be regarded as void, and as vesting no title in the plaintiff, who claimed under it; but the court, in disposing of this question, said: "It is further contended that as to the premises for which a verdict has been returned for the demandant, he has made out by the evidence no title thereto; inasmuch as his grantor, as it is insisted, at the time of the execution of the deed by him, was disseised of this part of the land by the tenant, and that therefore nothing passed by the deed. The tenant has no title to any part of lot No. 4, nor does he pretend to have any. He is the owner of No. 3; and he claims and defends the premises in dispute as part of that lot. If they are no part of that lot, his claim is plainly founded in mistake. If the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjacent tract within his inclosure, this does not operate a disseisin, so as to prevent the true owner from conveying and passing the same by deed": *Brown v. Gay*, 3 Greenl. 126. See also *Ross v. Gould*, 5 Greenl. 212.

In the cases just cited, the possession had not been continued a sufficient length of time to create a prescriptive title; but in subsequent cases determined in the same state, the defendants had been in possession more than twenty years, but less than twenty years after they knew that the line to which their possession extended was beyond the true boundary of their land; but as in each instance the possession taken was under a deed, and as there was no evidence that either claimed when he took possession any

land not included in his deed, his possession was held not to be adverse, and therefore not to support a claim of title by prescription: *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 456; *Dow v. McKenney*, 64 Me. 123.

In several other cases in which the question has arisen conclusions were reached in harmony with those sustained by the cases last cited. It appears to be a fair result of the decisions upon this side of the question to say that whenever a person proceeds to take possession of a tract of land which has been conveyed to him, and in so doing he includes within his possession and subsequently holds a portion of the adjacent tract, and it appears probable that his taking possession of the strip not belonging to him arose through his ignorance or mistake with respect to his boundary, then that though he believes and claims that all the land of which he is possessed is his, and intends to exclude all persons therefrom, yet that his possession is not adverse, as against the owner of the strip of which he has taken possession, until the true boundary line is ascertained, and he for the first time has an opportunity of determining whether he will hold and adversely possess land which he knows not to be included within the boundaries of the conveyance under which his entry was originally made: *Grube v. Wells*, 34 Iowa, 148; *Gates v. Butler*, 3 Humph. 447; *Howard v. Reedy*, 29 Ga. 152; 74 Am. Dec. 58; *Gilcrist v. McLaughlin*, 7 Ired. 310; *Brown v. Cockerell*, 33 Ala. 38; *Burnell v. Russell*, 39 Vt. 579; *Wood v. Willard*, 37 Vt. 377; 86 Am. Dec. 716; *Skinner v. Crawford*, 54 Iowa, 119; *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474; *McDonald v. Fox*, 20 Nev. 364; *Sartain v. Hamilton*, 12 Tex. 719; 62 Am. Dec. 524. *Shells v. Haley*, 61 Cal. 157, is apparently in accord with the foregoing authorities, but is difficult to reconcile with *Grimm v. Curley*, 43 Cal. 250, nowhere directly overruled.

The major portion of the decisions in Missouri, including that in the principal case, appear to us to be in harmony with the rule just stated: *Crawford v. Ahmes*, 103 Mo. 88; *St. Louis Union v. McCune*, 28 Mo. 481; *Knowlton v. Smith*, 36 Mo. 507; 88 Am. Dec. 152; *Houx v. Batteen*, 68 Mo. 84; *Keen v. Schnedler*, 92 Mo. 516; *Tamm v. Kellogg*, 49 Mo. 118; *Schad v. Sharp*, 95 Mo. 578; *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; but there is one decision in that state which we know not how to harmonize with the others: *Cole v. Parker*, 70 Mo. 372. It apparently proceeds upon the principle that, though the possession was taken by mistake and held in the belief that the land of which it was taken was all within the boundaries described in the conveyance under which the entry was made, yet that it must be deemed adverse, unless it farther appears that there was an intention, should any mistake be discovered, to surrender whatever had been held under such mistake. Of course this exception, if sustained, must destroy the rule, or at least render it inapplicable to all cases likely to arise, for it cannot be expected that one who has held under a mistake, and who, upon the mistake being discovered, still endeavors to hold under a claim that he has in the mean time acquired a prescriptive title, will admit that when he took possession, believing he was taking only his own, he formed an intention to afterwards give up such parts as should be found to belong to another. This decision also seems not to accord with the presumption usually indulged in respect to the holding of lands. The presumption to which we refer is one incorporated in many of the statutes of limitation, and which we think is generally implied, whether stated in direct terms or not, and is to the effect that possession is always presumed to be held in subordination to the legal title. By reason of this presumption, the mere holding of the lands of another, how-

ever long continued, is not sufficient evidence of title by prescription, but must be aided by other testimony, from which the inference may reasonably be drawn that such possession was maintained in hostility to the title of the true owner. The presumption ought to apply with special force when it appears probable that possession of lands adjacent to a boundary line was taken through ignorance or inadvertence, and maintained without thought of disseising the owner.

Of course the decisions asserting that possession taken and held under a mistake of the boundary line is not adverse must proceed upon the ground that before the possession can be adverse there must exist an intent to disseise the owner; that whatever is done accidentally or ignorantly cannot be accompanied with such an intent, and finally, that when an entry is made under a deed, and in attempted conformity to it, it cannot be presumed that he who enters under it intends to defend and maintain his entry when shown not to be supported by his deed. If these grounds or assumptions can be maintained, it is difficult to escape the conclusions which have been drawn from them. But their soundness is by no means conceded. It may well be held that it is not the intent to disseise another, but the intent to possess for himself and as his own, which makes the entry on the lands of another a disseisin; that the reasons which influence the entry are not material, provided it was made under a claim of ownership and continued in a belief in its rightfulness, or with the intention, whether it is rightful or not, to maintain it against all persons. Hence the decisions which affirm that the possession beyond a boundary line, though it was taken through mistake or ignorance, will support a plea of the statute of limitations and create a title by prescription are not less numerous nor reasonable than those sustaining the contrary conclusion: *French v. Pearce*, 8 Conn. 439; 21 Am. Dec. 680; *Metcalf v. McCutchen*, 60 Miss. 145; *Seymour v. Carl*, 31 Minn. 81; *Swettenham v. Leary*, 18 Hun, 287; *Moss v. Long*, 64 N. C. 433; *Yetter v. Thoman*, 17 Ohio St. 130; 91 Am. Dec. 122; *Ramsey v. Glenny*, 45 Minn. 401; 22 Am. St. Rep. 736; *Smith v. McKay*, 30 Ohio St. 418; *Levy v. Yerga*, 25 Neb. 764; 13 Am. St. Rep. 525; *Tex v. Pfug*, 24 Neb. 666; 8 Am. St. Rep. 231; *Causfield v. Clark*, 17 Or. 473; 11 Am. St. Rep. 845. Still the rule in many of these decisions is stated in terms so qualified as to make its application difficult in many instances. This qualification appears to require some special showing that the holding beyond the boundary line was with intent to disseise the owner, and not a mere holding for convenience until the boundary could be more accurately ascertained. In many cases, from the death of one who first took possession beyond the boundary, or from some other cause, it is impossible to furnish any direct evidence of the intent with which such possession was originally taken or subsequently held. When such is the fact, it is impossible to affirm with confidence whether, in the courts whose decisions have last been cited above, the intent to hold adversely will be inferred or not from the mere fact that a strip adjacent to the boundary line has been possessed and used in the same manner as the possessor used the contiguous tract, the title to which was vested in him beyond controversy.

LANEY v. GARBNER.

[105 MISSOURI, 365.]

JUDGMENTS — JURISDICTION. — WHEN SERVICE OF PROCESS IS CONSTRUCTIVE, IT MUST CONFORM, at least substantially, to the requirements of the statute.

JUDGMENTS — JURISDICTION. — IN DETERMINING WHETHER A COURT HAD JURISDICTION TO RENDER A JUDGMENT, the whole record must be inspected; and if the judgment itself declares that the defendant, though duly served with process of summons, comes not, but makes default, but the return found in the record shows a service which is insufficient and unauthorized by law, the judgment must be disregarded as void.

JUDGMENTS — JURISDICTION. — RECITALS IN A JUDGMENT OF THE SERVICE OF PROCESS are deemed to refer to the kind of service shown by other parts of the record.

Gideon and Gideon, for the appellants.

James R. Vaughan, for the respondent.

MACFARLANE, J. Ejectment to recover a tract of land in Christian County. The answer admitted the possession, and denied all other facts.

The land was entered by plaintiff, which he showed, and rested. Defendants introduced in evidence, in support of their title, a deed from the sheriff of the county, conveying the land to one W. R. Jones, and a deed from Jones to defendant Wilkinson. The other defendants were tenants of Wilkinson. The sheriff's deed was under an execution sale upon a judgment of the circuit court of Christian County against plaintiff for delinquent taxes on the land for the years 1881, 1882, 1883.

The tax suit was brought to the September term, 1885, of said circuit court. At that term, a final judgment by default was rendered for \$37.35, the amount of unpaid taxes; an order enforcing the lien of the state on the land in controversy, with other lands, was made, and special execution ordered. This judgment, which is the basis of defendants' title, is attacked by plaintiff for want of jurisdiction of the person of John Laney, defendant therein.

The judgment contains the following recital: "Now, at this day comes on to be heard this cause, and the plaintiff appearing by attorney, and the defendant, though duly served with process of summons more than fifteen days before the first day of this term of court, comes not, but makes default."

To overcome this recital, plaintiff offered in evidence the original summons in the case, and the return of the sheriff

thereto. The summons was in the usual form, and the return was as follows: "Executed the within writ, in the county of Christian, on the fourth day of August, A. D. 1885, by delivering a certified copy of this writ and the petition to a member of John Laney's family over the age of fifteen years." It was also shown that, during the years 1884 and 1885, John Laney was a resident of Greene County.

Defendants objected to this evidence, on the ground that the recitals of the judgment were conclusive, and could not be contradicted or impeached collaterally. The objection was overruled. The court, trying the facts as a jury, declared the law to be, that, under the evidence, the finding should be for plaintiff, and so judgment was entered. Defendant appealed.

The service, as shown by the return of the sheriff, was not according to any method known to the law, and was equivalent to no service at all. The third clause of section 3689, Revised Statutes of 1879, under which, doubtless, the service was attempted, required a copy of the petition and writ to be left "at the usual place of abode" of defendant, "with some person of his family over the age of fifteen years." The service here provided is constructive, and must conform, at least substantially, to the requirements of the statute: *Bank v. Suman*, 79 Mo. 530; *Brown v. Langlois*, 70 Mo. 226; *Blodgett v. Schaffer*, 94 Mo. 669.

It is insisted that the manner of service cannot be shown to contradict the recitals of the judgment. If the entry of the judgment upon the books of the court constituted all the record in the case, the contention would have weight. That is not the case. The return of the sheriff is as much a part of the record as the judgment entry. The recitals of the service, contained in the judgment, cannot import greater verity than the return itself shows.

Since the decision in the case of *Cloud v. Pierce City*, 86 Mo. 358, where the question was exhaustively considered, it has been held in this state, even in collateral proceedings, that the jurisdictional recitals of a judgment of due service of process will be controlled by, and must yield to, the service as it appears upon the whole record. The recitals of the judgment will be deemed to refer to the kind of service shown by other parts of the record: *Milner v. Shipley*, 94 Mo. 106; *Adams v. Cowles*, 95 Mo. 506; 6 Am. St. Rep. 74; *Crow v.*

Meyersieck, 88 Mo. 415; *McClanahan v. West*, 100 Mo. 821; *Blodgett v. Schaffer*, 94 Mo. 671.

The service of process in this case was wholly insufficient and unauthorized by law, and in consequence, the court never obtained jurisdiction of the person of defendant therein, and the judgment rendered was without validity, force, or effect, and defendant acquired no title by the sale and sheriff's deed thereunder. Judgment affirmed.

PROCESS — JURISDICTION. — When the recitals in a judgment by default, rendered upon service of process by publication, show conclusively that the process was never lawfully served, the judgment is a nullity, the court being without jurisdiction, although such judgment recites due services: *Fowler v. Simpson*, 79 Tex. 611; 23 Am. St. Rep. 370, and note. A judgment reciting service of process, but not stating the mode of service, when there is a return upon such process, must be considered as referring to such return, and if such service there shown is insufficient, the judgment is void: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301. Compare *Wilson v. Hawthorne*, 14 Col. 530; 20 Am. St. Rep. 290; *Shenandoah etc. R. R. Co. v. Ashby*, 86 Va. 232; 19 Am. St. Rep. 898. A recital in a judgment that due service of process was made upon defendant may be overcome by a showing upon the face of the whole record that such process was not in fact duly served: *Culver v. Phelps*, 130 Ill. 217; *Dickison v. Dickson*, 124 Ill. 483. However, in the case of a judgment entered in a cause at a term subsequent to the return term, reciting that defendant was duly served with process, where the record showed an insufficient service, it has been held that, in favor of such recital, the court will presume that a second summons was issued and duly served to the subsequent term: *Hemmer v. Wolfer*, 124 Ill. 435.

PROCESS — CONSTRUCTIVE SERVICE. — Jurisdiction over defendant is acquired in cases of service of summons by publication only when the statutory requirements are successively and accurately taken: *Beckett v. Cuenin*, 15 Col. 281; 22 Am. St. Rep. 399, and note.

JUDGMENTS WHEN VOID. — When it appears from the whole record that a court had no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding: *Hope v. Blair*, 105 Mo. 85; *ante*, p. 366. and note.

CORCORAN v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.

[185 MISSOURI, 289.]

NEGLIGENCE, CONTRIBUTORY. — THE ACT OF CLIMBING OVER STATIONARY CARS ON A RAILWAY TRACK, without looking to see whether they are attached to an engine or not, is such contributory negligence as to preclude any recovery for injuries received while so doing. The fact that the person injured is a police-officer, that his necessity for crossing the track is imperative, and that the cars are obstructing a street in violation of a city ordinance, does not render the rule inapplicable to him.

CONTRIBUTORY NEGLIGENCE, WHEN PRECLUDES REDRESS. — Notwithstanding the negligence of the defendant, if the plaintiff was also negligent, which the defendant did not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery.

CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE COURT. — When no other inference than that of negligence can be fairly and reasonably drawn from the evidence, it should be declared by the court as a matter of law.

Bennett Pike, for the appellant.

A. and J. F. Lee, for the respondent.

MACFARLANE, J. The action is for damages for personal injuries caused, as is alleged, by the negligence of defendant. Plaintiff had judgment in the circuit court of St. Louis City for seven thousand five hundred dollars, and defendant appealed.

At the close of plaintiff's evidence, defendant asked the court to instruct the jury that, upon the pleadings and evidence in the case, the verdict should be for defendant; this the court refused to do. The proper determination of the case depends upon the propriety of the court's ruling in refusing this instruction.

It becomes necessary, therefore, to set out, somewhat at length, the pleadings and evidence. The petition charges that on the twelfth day of October, 1886, defendant obstructed Carroll Street, a public highway in the city of St. Louis, by standing across it for the period of half an hour a long train of coal-cars; that plaintiff was a police-officer in said city, and his duties as such required him to go west on said street to a point beyond said obstruction, which he could not do without crossing upon said cars; that he attempted to cross over said cars while they were standing still, but while on top of the cars defendant caused them "to be moved sud-

denly and violently, and without notice, signal, or warning, and thereby plaintiff was violently thrown to the ground from one of said cars upon which he was standing in his efforts to cross," whereby he was severely injured.

The petition then charges that the injuries so received were caused by the negligence of defendant in failing to observe the requirements of certain ordinances of the city forbidding railroad companies to obstruct any street crossing by standing cars thereon longer than five minutes; requiring that "when moving, the bell on the engine shall be constantly sounded," prohibiting any freight train to be moved "without it be well manned with experienced brakemen at their post, who shall be so stationed as to see the danger signals and hear the signals from the engine," and requiring them to "station at each cross or intersecting improved street a watchman, who shall display at the crossing of cars in the daytime a red flag, and at night-time a red light."

Defendant's answer was a general denial and a general plea of contributory negligence.

The evidence shows that defendant's yards in the city of St. Louis extend north and south adjacent to the levee on the river front; that twenty-two or twenty-three tracks extend across the yards north and south; that Carroll Street is a public macadamized street running east and west across this yard to the river, on the east; that no other public street crosses the yard within three blocks north or south of Carroll; that on the night of October 12, 1886, about ten o'clock, plaintiff and a companion, both of whom were police-officers of the city of St. Louis, in the proper discharge of their duties, were required to go from the river east of to a part of the city west of defendant's yards. The most direct and practical route was over Carroll Street. When they came to the east side of the yards they discovered that the street was obstructed by some box-cars. They waited there from fifteen minutes to half an hour, and the cars were not removed. They then went west on the street until they came to these cars and walked to the north around them, they then found that a long line of flat coal-cars, coupled together into a train, also stood across Carroll Street.

The end of this train could not be seen north or south of the street. The yard at the time was full of cars, and two or three engines were at work switching cars on the tracks. No engine was seen attached to the train of coal-cars, nor had

they been moved for half an hour. There was an electric light on this street crossing, giving a good light. On the west side of these coal-cars a platform, or running-board about eighteen inches wide, extends across the ends. Without stopping, when coming to this obstruction, plaintiff's companion got upon this running-board and by it passed over the car, and got down on the opposite side safely. Plaintiff, in order to cross, got upon the running-board, walked over it to the opposite side of the car, and while in the act of jumping to the ground, "the slack of the train came back from the south end and came together, and the end of the car bounded" (as plaintiff testified), and he was thrown to the ground and his shoulder dislocated. No flagman was stationed at this crossing, no brakeman was seen on the coal-cars, and no bell on an engine was heard to ring before this car was moved.

Plaintiff had been on the police force in the city since 1872, and in this particular locality eight or nine months, and was accustomed daily to pass over defendant's yards by day and night. North of Carroll Street was a large lumber-yard fenced in, and south a coal-yard, where engines were constantly at work. There were more cars and obstructions there than at Carroll Street. It was dangerous to walk between trains or tracks, on account of moving cars and trains.

Plaintiff put in evidence the ordinances of the city, which are the same as those referred to in the answer. Defendant offered no evidence and asked no instruction, other than the demurrer to the evidence. The statement of facts is substantially as given in plaintiff's testimony.

It has been held by a majority of this court in a recent case (*Hudson v. Wabash etc. R'y Co.*, 101 Mo. 31), very similar in all particulars to this, "that the act of climbing over stationary cars, without looking to see whether they were attached to an engine or not," was such contributory negligence as to preclude a recovery for injuries received while making such attempt. A number of text-books and reported cases are cited in support of the decision. The following authorities also sustain the view taken in that case: *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376; *O'Mara v. Delaware etc. Canal Co.*, 18 Hun, 193. None have been found asserting the contrary.

It is argued that the rule adopted in the Hudson case should not be held to apply to the case at bar, for the reason that plaintiff was a police-officer of the city, and the proper

discharge of his official duties made the necessity of his crossing the track imperative. We can see no force in this contention. Indeed, we think his duty to observe care was increased, rather than lessened, by the fact of his official duties, and the information and knowledge he necessarily obtained in their performance. His duties for eight or nine months preceding his injuries had required him to be daily in and about defendant's yards. His testimony shows that he was fully aware of the dangers from moving trains and switching cars. He knew the obstruction of the track was in violation of the ordinances of the city, and that it was defendant's duty to move the cars, and that he might expect them to be moved at any moment. Moreover, he knew that defendant was disregarding and violating the laws of the city, which it was his duty as a police-officer to prevent. He could not insist, as an excuse for his negligence, that imperative duty required him to go elsewhere, when the law was being openly violated before his eyes. Plaintiff did not know whether an engine was attached to these cars or not, but he did know that one ought to have been attached to them for the purpose of taking them off the crossing; he did know that two or three engines were at work on the yards, moving trains and switching cars, and that these cars were liable to be struck or moved at any moment. Knowing these facts, it was gross negligence to go upon the cars when and in the manner he did, and he thereby took upon himself the risk of being injured.

It was not pretended that any of the employees of defendant knew the perilous situation in which plaintiff had placed himself, and they were not bound to look for him where he had no right to be: *Rine v. Chicago etc. R. R. Co.*, 88 Mo. 392; *Barker v. Hannibal etc. R. R. Co.*, 98 Mo. 50; *Hudson v. Wabash etc. R'y Co.*, 101 Mo. 81.

The facts in this case are undisputed. No reasonable person can hesitate to pronounce the act of plaintiff in going upon the car in question one of gross negligence. He himself recognized the danger he would incur, which is shown in the fact that he waited for fifteen minutes to half an hour for the obstruction to be removed, and looked up and down the train for an opening which would allow him to pass over in safety, before he would venture into the perilous situation.

It is well settled that notwithstanding the negligence of defendant, if plaintiff was also negligent, which defendant did

not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery: *Hudson v. Wabash etc. R'y Co.*, 101 Mo. 31; *Murray v. Missouri Pac. R'y Co.*, 101 Mo. 237; 20 Am. St. Rep. 601; *Stillson v. Hannibal etc. R. R. Co.*, 67 Mo. 671; *Kellny v. Missouri Pac. R'y Co.*, 101 Mo. 67; *Weber v. Kansas etc. R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541.

Whether, in any particular case, the plaintiff was guilty of contributory negligence, is generally a question of fact for the determination of a jury; but when no other inference than that of negligence can be fairly and reasonably drawn from the evidence, as in this case, it should be declared as a matter of law.

The demurrer to the evidence should have been sustained. Judgment reversed.

CONTRIBUTORY NEGLIGENCE A QUESTION FOR WHOM. — When, from the undisputed facts, only one conclusion can be drawn, the question of contributory negligence is for the determination of the court: *Angel v. Smith*, 82 Mich. 1; 21 Am. St. Rep. 549; *Matthews v. Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436.

CONTRIBUTORY NEGLIGENCE WHEN PRECLUDES REDRESS. — When an injury results from the concurrent negligence of both the plaintiff and the defendant, the rule seems to be, that the plaintiff will not be allowed to recover: *Kellny v. Missouri Pac. R'y Co.*, 101 Mo. 67; for any degree of negligence on the part of the plaintiff contributing proximately to the injury defeats his recovery therefor: *Oil City etc. Co. v. Boundy*, 122 Pa. St. 449; *Smithwick v. Hall*, 59 Conn. 261; 21 Am. St. Rep. 104, and note; *Robb v. Connellsville*, 137 Pa. St. 42; *McDonald v. Rockhill etc. Co.*, 135 Pa. St. 1; *Johnson v. Wilcox*, 135 Pa. St. 217; *Chartiers Township v. Phillips*, 122 Pa. St. 601; *Patterson v. Central R. R. etc. Co.*, 85 Ga. 653; *Chicago etc. R. R. Co. v. Warner*, 123 Ill. 38; *Evans v. Adams Exp. Co.*, 122 Ind. 362; *Allen v. Maine etc. R. R. Co.*, 82 Me. 111; *Williams v. Edmunds*, 75 Mich. 92; *Karrer v. Detroit etc. R. R. Co.*, 76 Mich. 400; *Kelley v. Doody*, 116 N. Y. 575; *McAdoo v. Railroad*, 103 N. C. 142; *Galveston etc. R'y Co. v. Chambers*, 73 Tex. 297; *Stewart v. N. N. & M. V. Co.*, 86 Va. 988; notwithstanding the fact that the defendant may also have been guilty of negligence: *Guess v. Railway Co.*, 20 S. C. 163. But it has been held that plaintiff may recover, although having been himself negligent, if the defendant might have avoided the accident by using reasonable care and prudence: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note; *Lay v. Richmond etc. R. R. Co.*, 106 N. C. 404. In *Curley v. Missouri Pac. R'y Co.*, 98 Mo. 12, it was considered contributory negligence precluding redress for a boy to enter an empty car standing upon a railroad track, which was being made into a train by the railroad employees.

SHERWOOD v. BAKER.

[18: MISSOURI, 472.]

JURISDICTIONS, PRESUMPTIONS OF. — THE ORDERS AND JUDGMENTS OF PROBATE COURTS, when acting with their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction.

PROBATE SALES, PRESUMPTIONS IN SUPPORT OF. — If the records of a probate court show an order to sell real property to pay debts, a report of the sale made thereunder, an order approving the sale and directing the administrator to convey to the purchaser, it will be presumed that the sale was authorized, and that all requisite antecedent steps were duly and timely taken, until the contrary appears.

EQUITY WILL AID A PURCHASER AT AN ADMINISTRATOR'S SALE who is entitled to but has not received a conveyance from the administrator, by denying recovery in ejectment to the heirs, or by vesting him with the perfect title, provided he has on his part complied with all the terms of the sale.

STATUTES OF LIMITATIONS. — IN A SUIT IN EQUITY AGAINST THE WIDOW AND HEIRS OF A DECEDENT by a purchaser of his real property at a probate sale, to whom the administrator has made no conveyance, to have the legal title vested in such purchaser, the statute of limitations applicable to real actions should be applied, and not that applicable to personal actions.

STATUTE OF LIMITATIONS AGAINST EQUITABLE TITLE. — One who has an equitable title to realty, though he has no right to recover possession by an action at law, has a real and substantial right to the land and its possession, which can be extinguished only by an actual, consecutive, adverse possession for the time required to extinguish legal title by prescription.

ADVERSE POSSESSION — SUIT TO ASSIGN DOWER. — THE POSSESSION OF A WIDOW, so long as her dower remains unassigned, is not adverse to the heirs, nor to one who purchases under a sale made by the administrator of her deceased husband; and the laches of such purchaser in not asserting his right to have dower assigned cannot defeat him when he finally does proceed for that purpose.

Silsby and Buckley, John W. Jump, and A. L. Drew, for the appellants.

Goode and Cravens, for the respondent.

MACFARLANE, J. The probate court of Lawrence County, on the twenty-third day of February, 1869, made an order directing Daniel Biddlecome, public administrator of said county, having in charge the estate of Jonathan L. Fare, deceased, to sell the real estate in controversy herein for the payment of debts.

The land was sold to respondent for \$605, and the sale duly reported to the probate court of said county August 2, 1869. The purchase price was paid to the administrator,

and was applied to the payment of debts. The report of the sale was approved, by the order of said court, October 23, 1869. A deed was never made to respondent by the administrator. Defendant, Jemima Fare, was the widow of deceased. Jonathan L. Fare lived on this property up to the time of his death, and thereafter his widow continued to reside thereon, with her children, making no claim other than dower, until the trial of this cause in the circuit court.

This is a suit in equity, commenced May 27, 1884, against the widow and heirs of deceased, by which plaintiff undertook, by decree of court, to have vested in himself the legal title to said real estate, by virtue of the equity acquired through his purchase from the administrator, and to have an assignment of the dower of the widow.

The answer was a general denial; a plea of the ten years' statute of limitation, and of ten years' adverse possession. Judgment was for plaintiff.

1. Several questions were raised at the trial respecting the admissibility of evidence offered and admitted, to prove the foregoing facts, and as to the force and effect of orders of probate courts.

It is now well settled that the orders and judgments of probate courts, when acting within their jurisdiction, are entitled to the same favorable presumptions as are accorded to courts of general jurisdiction, and are no more subject to collateral attack: *Price v. Springfield Real Estate Ass'n*, 101 Mo. 107; 20 Am. St. Rep. 595; *Camden v. Plain*, 91 Mo. 117; *Rowden v. Brown*, 91 Mo. 429.

2. The records of the probate court of Lawrence County, introduced in evidence, showed an order on Daniel Biddlecome, public administrator, in charge of the estate of Jonathan L. Fare, to sell the land in controversy for the payment of debts; a report of the administrator, showing a sale to plaintiff for \$605; an order approving the sale, and an order on the administrator to make a deed conveying the land to the purchaser. From these orders, it will be presumed that the sale was authorized, and that "all requisite antecedent steps had been duly and timely taken, until the contrary is made to appear": *Price v. Springfield Real Estate Ass'n*, 101 Mo. 107; 20 Am. St. Rep. 595. The purchase of the land under these orders, the payment of the purchase-money, and the approval of the sale gave to the purchaser a clear right to a deed from the administrator. Did he acquire such an

equity in the land as can be enforced in a suit against the heirs?

The question whether a court of equity would lend its aid in such cases was carefully and exhaustively considered by this court in the case of *Henry v. McKerlie*, 78 Mo. 419, and all the decisions in this state on the subject reviewed, and an affirmative answer to the inquiry was reached. In conclusion of this review, the court, by Martin, C., says: "When the sale by an administrator or curator, under an order of the court, has been regularly approved by the court, this fact, of itself, passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed, or the want of any deed, the court will enforce in his favor, by denying recovery in ejectment by the heirs, or by vesting him with the perfect title; provided, always, that he has, on his part, complied with the terms of the sale." See also *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin M. & S. Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42. This decision was approved in the cases of *Burden v. Johnson*, 81 Mo. 323, and *Moore v. Davis*, 85 Mo. 464.

Upon the death of their ancestor, the legal title to the land descended to and vested in the heirs, subject to the rights of the widow. The administrator took no title, and only held the naked power to sell and convey under the orders of the probate court. Until conveyance, the legal title remained in the heirs. The sale by the administrator vested the equitable title in plaintiff, and he had the right to proceed in equity, against the heirs, to have the legal title vested in himself.

3. The question of most difficulty is the application of the statutes of limitation. If the statutes limiting personal actions govern, then the suit was clearly barred in ten years after plaintiff acquired the equitable title. On the other hand, if the statute limiting real actions is to be applied, there was no bar, unless there had been a possession adverse to plaintiff for ten consecutive years after his right of entry accrued. The circuit court held, we think correctly, that the case was governed by the law limiting real actions.

The distinction between these two statutes is, that under the former the action is barred, while under the latter the title is extinguished. When real estate is held adversely, the statute operates upon the title, and when the bar is complete, the title of the original owner is defeated. The title is not

affected so long as no one holds adversely: *Allen v. Mansfield*, 82 Mo. 693; Angell on Limitations, sec. 1; Buswell on Adverse Possession, sec. 4; 8 Washburn on Real Property, 164; Sedgwick and Wait on Trial of Titles, sec. 727; Wood on Limitations, p. 498, sec. 254; *Ridgeway v. Holliday*, 59 Mo. 444.

It is thus seen that the operation of the statute does not depend more on what the claimant has omitted to do than upon what the adverse possessor has done. Following these principles, it has been held by this court that a defendant holding under an equitable title can set it up in defense of an action for possession by the holder of the legal title, without regard to the statutes of limitations: *Sebree v. Patterson*, 92 Mo. 457. Ten years' adverse possession by a mortgagor is necessary to bar an action of foreclosure: *Gardner v. Terry*, 99 Mo. 523; *Atchison v. Pease*, 96 Mo. 566; *Benton Co. v. Csarlinsky*, 101 Mo. 275. In an action to set aside a fraudulent sale of land and for possession, the limitations to real actions apply: *Rodgers v. Brown*, 61 Mo. 191; *Hunter v. Hunter*, 50 Mo. 451.

While the equitable title acquired by plaintiff, through his purchase from the administrator, did not give him the right to recover possession by an action at law, it did invest him with the real and substantial right to the land and its possession. That title and right could only have been extinguished, under the limitation law, by an actual and consecutive adverse possession for ten years.

When plaintiff purchased, the widow was in possession under her statutory, quarantine right. Her continuance of the possession, so long as her dower remained unassigned, was not adverse to the heirs, or plaintiff, who held the title inherited by them from her deceased husband: *Hickman v. Link*, 97 Mo. 482; *Brown v. Moore*, 74 Mo. 633; *Roberts v. Nelson*, 87 Mo. 229; *Roberts v. Nelson*, 86 Mo. 21.

As to whether plaintiff ought to be barred by reason of near twenty years' delay in asserting his right to have dower assigned, we will but apply the language of Norton, J., in *Brown v. Moore*, 74 Mo. 633, to the facts in this case: "The mere fact that [plaintiff] was willing to and did permit [the widow] to enjoy this possessory right, and did not terminate it by having her dower assigned, as she might have done, instead of rendering him liable to the imputation of laches, is rather to be counted to his credit."

As no question was raised in the lower court as to the joinder of the widow and heirs in the same proceeding, the objection was waived: *Kellogg v. Malin*, 62 Mo. 430. Judgment affirmed.

PROBATE COURTS — PRESUMPTION OF JURISDICTION. — The orders and judgments of the probate courts of Missouri are entitled to the same favorable presumptions as to jurisdiction as are those of other courts of general jurisdiction: *Price v. Springfield etc. Ass'n*, 101 Mo. 107; 20 Am. St. Rep. 595, and note 600, 601; *Apel v. Kelsey*, 52 Ark. 341; 20 Am. St. Rep. 183, and note.

ADVERSE POSSESSION, WHAT DOES NOT CONSTITUTE. — The possession of a widow, so long as her dower remains unassigned, is not adverse: *Hannon v. Hounihan*, 85 Va. 429; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 73, and note.

LANDIS v. SAXTON.

[105 MISSOURI, 486.]

TRUSTS — STATUTES OF LIMITATION. — The trusts against which the statute does not run are those technical and continuing trusts not cognizable at law, and falling within the proper, peculiar, and exclusive jurisdiction of courts of equity; but such other trusts as may be the ground of an action at law are subject to the operation of the statute.

STATUTES OF LIMITATION. — AN ACTION AGAINST THE FORMER SECRETARY AND TREASURER OF AN EXTINGUISHED CORPORATION by its surviving director for an accounting and payment of moneys received during its existence is subject to the operation of the statute of limitations, and is not protected from that statute on the ground that the action is to enforce a trust. The cause of action must be regarded as arising upon the dissolution of the corporation.

STATUTE OF LIMITATIONS. — THOUGH A DEMAND IS NECESSARY TO GIVE A RIGHT OF ACTION, the general rule is, that such demand must be made within the period prescribed by the statute of limitations.

Huston and Parrish, and B. R. Vineyard, for the appellant.

S. S. Brown, for the respondent.

SHERWOOD, P. J. This action was brought in 1887. By it plaintiff seeks to recover from the defendant, as the former secretary and treasurer of the St. Joseph Extension Company, organized in 1855, and which expired by the limitation of its charter in 1875, a certain sum of money alleged to have been received by him during his term of office as such secretary and treasurer, to wit, the sum of ten thousand dollars. Plaintiff sues as the last surviving director, alleging that all the rest, president and members of the board of directors, are dead; that no settlement was ever had with defendant for the

moneys received by him as aforesaid; and that he failed to account for the same, or to pay the same over to said corporation during its existence or to its trustees, and that it was the duty of defendant, as such secretary and treasurer, concerning the moneys he received in that capacity, "to hold and pay out (such moneys) only on the order of said corporation during its existence, or on the demand of its trustees after its dissolution," but that he retains and still has the same. Allegation is then made that plaintiff as sole surviving member of the corporation, on the thirtieth day of July, 1887, made demand on defendant for the amount so received by him, which he refused to pay over, etc.

The defendant successfully demurred to the petition, on the ground that the cause of action did not accrue within five years, and judgment was entered accordingly. This action is alleged to be based on section 2513, Revised Statutes of 1889, which provides as follows: "Upon the dissolution of any corporation already created or which may hereafter be created by the laws of this state, the president and directors or managers of the affairs of said corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of such corporation, with full powers to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them; to sue for and recover such debts and property by the name of the trustees of such corporation, describing it by its corporate name, and may be sued by the same; and such trustees shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

1. Was the action of the plaintiff barred by the statute? The trusts against which the statute will not run "are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction" of a court of equity; but other trusts which are the ground of an action of law are open to the operation of the statute: *Kane v. Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417. The kind of trusts which fall within the exclusive jurisdiction of a court of equity are direct trusts created by deed or will, or by appointment of law, — e. g., executorships or administrations; but cases of constructive or implied trusts,

which result from partnerships, agencies, and the like, are subject to the operation of the statute: *Farnam v. Brooks*, 9 Pick. 212. The crucial test in all such cases is, Is there a remedy at law? If there is, that is a conclusive answer to the claim that a technical trust as aforesaid has been created: *Murray v. Coster*, 20 Johns. 588; 11 Am. Dec. 382.

Referring to the case in 7 Johnson's Chancery, and 20 Johnson, *supra*, with approval, Judge Story says, in *Robinson v. Hook*, 4 Mason, 152: "But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed": Angell on Limitations, 6th ed., 174, 175, and cases cited. As showing that directors of a corporation are not trustees within the technical rule, and that they may invoke the statutory bar when sued, see *Williams v. Halliard*, 88 N. J. Eq. 373; *Sperling's Appeal*, 71 Pa. St. 1.

In *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, under a statute substantially identical with the one under discussion, it was also ruled that the directors of an incorporated company were not technical trustees within the equity rule, and when sued for dividends on shares could invoke the statute. If the directors, who become trustees in name upon the dissolution of the company, can successfully invoke the statute, may this not be done by their ministerial agent, their mere clerk? 1 Morawetz on Private Corporations, sec. 516.

2. Cases arising in regard to deposits in banks have no relevancy to cases of this sort; for there the very purpose of the bailment is safe-keeping, and the duration of the bailment is necessarily indefinite. There some action is requisite in order to terminate the bailment, and to put the bailee in the wrong, in case he refuse to accede to the demand for the deposit made. The same may be said in some respects of an attorney: *Beardslee v. Boyd*, 37 Mo. 180.

3. Again, the cause of action in this cause arose upon the dissolution of the corporation; the defendant could then have been sued for the sum then in his hands, as it was then his duty to have turned over to the trustees whatever sum he held belonging to the corporation. "Where an obligation to pay

is complete, a cause of action at once arises, and no demand is necessary": *Watson v. Walker*, 23 N. H. 471; Angell on Limitations, *supra*. The defendant is not sued for a conversion of the sum in his hands, but in an ordinary action for its recovery, and section 2948, Revised Statutes, in such cases dispenses with the necessity for making a demand. *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, recognizes this as true. But if it be conceded that a demand on the defendant was necessary in order to give a right of action, still, the general rule is, that where a right of action is dependent on this course, such demand must be made within the period which the statute prescribes: *Ball v. Keokuk etc. R'y Co.*, 62 Iowa, 753; *Palmer v. Palmer*, 36 Mich. 488; 24 Am. Rep. 605; *Codman v. Rogers*, 10 Pick. 112; *Jameson v. Jameson*, 72 Mo. 640; *Atchison etc. R. R. Co. v. Burlingame*, 36 Kan. 628; 59 Am. Rep. 578; *Morrison v. Mullin*, 84 Pa. St. 12.

As illustrative of the views entertained by the courts on this topic, we quote: "To give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued by the duty of diligence required of the party. Where the time for doing the act necessarily precedent to bringing the suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins; and if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run": *Morrison v. Mullin*, 84 Pa. St. 12.

In *Palmer v. Palmer*, 36 Mich. 488, 24 Am. Rep. 605, Campbell, J., said: "If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable."

Viewing the matter in this light, we affirm the judgment.

STATUTE OF LIMITATIONS — TRUSTS. — The statute of limitations does not apply to technical continuing trusts: *Pressley v. Davis*, 7 Rich. Eq. 105; 68 Am. Dec. 306, and note. The statute of limitations in equity is held inap-

applicable to a class of express, continuing, and subsisting trusts: *Oosh v. River*, 13 Smodes & M. 323; 53 Am. Dec. 83; *Kane v. Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417, and note. See also extended note to *Miles v. Thorne*, 39 Am. Dec., at page 391; *Dole v. Wilson*, 39 Minn. 330.

STATUTE OF LIMITATIONS — DEMAND. — Where a demand is necessary to give the plaintiff a right of action, such demand will be presumed, if not made within a reasonable time: *Hamilton v. Hamilton*, 18 Pa. St. 25; 55 Am. Dec. 585; *Collard v. Tuttle*, 4 Vt. 491; 24 Am. Dec. 627.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

STILLWELL v. STILLWELL.

[47 NEW JERSEY EQUITY, 276.]

RELIEF IN EQUITY TO PROTECT TITLE ACQUIRED IN FRAUD OF CREDITORS. —

If a husband conveys property to his wife for the purpose of defrauding his creditors, and upon her refusal to reconvey, assists one of his creditors to obtain a decree against her, without her knowledge and without service of process upon her, setting aside the conveyance, and directing the property to be sold, and then purchases at the sale made under the decree, equity will, at her instance, set aside the decree and the sale thereunder, and will not refuse relief on the ground that her title was acquired in fraud of the creditors of her husband.

William S. Throckmorton, for the appellant.

Frank P. McDermott and H. M. Nevius, for the respondents.

BEASLEY, C. J. The facts of the case as established by the pleadings and the evidence are, in brief, these: That Charles A. Stillwell, the husband of the appellant, conveyed to her, as a cover against his creditors, the lands in dispute.

Subsequently, being desirous of again acquiring a title to the property, and his wife refusing to reconvey it, the husband assisted a creditor, who had obtained judgment, and had filed a bill to set aside the conveyance to the wife, on the ground of its fraudulent purpose, to obtain a decree and sale of the premises. By the contrivance of the husband, no process in this chancery suit was served on the appellant, and she was left in entire ignorance of the pendency of such suit. Nor did she know of the sale that took place in the procedure. At that sale the husband became the purchaser, and obtained a sheriff's deed. The consideration was his payment of his

own debt to the judgment creditor. Having thus acquired a title to the land through the sheriff, he concealed that fact from his wife, and in that situation of affairs died.

His heirs claiming the land, the wife filed her bill for relief against the title thus derived from her husband.

The case in the court of chancery appears to have been decided on the ground that inasmuch as the title of the appellant was acquired in fraud of creditors, a court of equity would not help her, and consequently her bill was dismissed.

But this ground of decision seems to be not congruous with the substantial issue. Whether the appellant's title was fraudulent or not was of no consequence in the present case. Admitting, as has been admitted, that the appellant's title, as derived from her husband, was void at the instance of creditors, that fact did not prevent her from setting up in a court of equity that either her husband or some one else had by fraud got the title from her. To hold otherwise would be to lay down the doctrine that the holder of one of these surreptitious titles was, with respect to it, put out of the protection of the law. There is no such principle of law or equity.

In this case the appellant is not in court attempting to validate her title; what she seeks is, that a decree and sale to which she was not a party by reason of the fraud of her husband, and in which he alone was interested, should be vacated.

This relief she is plainly entitled to.

Let there be a reversal, and a decree revesting title in appellant, etc.

FRAUDULENT CONVEYANCES — HUSBAND AND WIFE. — A *feme covert* induced by fraud to join with her husband in a conveyance of her land to defraud his creditors, she being no party to the fraud, and the grantee's object in procuring the conveyance being to defraud her, is not bound by such conveyance: *Stewart v. Inglehart*, 7 Gill & J. 132; 28 Am. Dec. 202, and note; see also note to *Driggs etc. Bank v. Norwood*, 7 Am. St. Rep. 78; *Kreitz v. Root*, 63 Mich. 502.

LOMERSON v. JOHNSTON.

[47 NEW JERSEY EQUITY, 312.]

FALSE REPRESENTATION MAY BE MADE BY PRESENTING THAT WHICH IS TRUE SO AS TO CREATE AN IMPRESSION WHICH IS FALSE, and then profiting by the false impression thus created.

FALSE IMPRESSIONS — MORTGAGE OBTAINED FROM A WIFE UNDER THE BELIEF, ON HER PART, that its execution was necessary to prevent the immediate arrest and imprisonment of her husband is inequitable, and the mortgagee will not be permitted to retain it, when he procured it by statements to the wife, which, though not false in themselves, produced, as he knew and intended they should, a false impression of danger to her husband.

BILL in equity upon a mortgage made by Margaret Johnston to secure indebtedness due from her husband. She by her answer insisted that the mortgage was procured by the mortgagee's stating to her that the indebtedness of her husband arose from the use of trust funds, and that in their use he had been guilty of embezzlement, and could be put under arrest. The trial court found in favor of the defendant, and declared the mortgage void.

J. G. Shipman, for the appellant.

W. H. Morrow and George M. Robeson, for the respondent.

GARRISON, J. We agree with the learned vice-chancellor who heard this cause in all his conclusions upon the testimony. The case shows in the clearest manner that Lomerson, the appellant, being involved with Mr. Johnston as surety and indorser, visited Mrs. Johnston for the purpose of securing himself against loss through the husband by obtaining from the wife a mortgage upon the house left to her by her father. The case further shows, and the vice-chancellor so finds, that, in attaining this object, Lomerson made to Mrs. Johnston a number of statements, all tending to excite in her mind the liveliest apprehensions that her husband was about to be lodged in jail for debt. The court of chancery, by its decree, set aside the mortgage thus obtained, considering that it was executed under a species of duress. With the result reached we agree, resting our decision, however, upon the ground that it is inequitable to permit the complainant to retain a security for the husband's debt obtained by allowing a false apprehension as to the husband's danger to affect the mind of the wife. That this apprehension was the sole consideration for the wife's compliance is not more clear than that the efficient

element of that apprehension, namely, the belief in the imminence of the anticipated arrest, was not only false, but was so to the knowledge of Lomerson.

In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who seeing the misapprehension seeks to profit by it, a case of false representation. In the present instance, Mrs. Johnston naturally gathered from the statements made to her by Lomerson that her husband had committed crimes for which he not only could and would be imprisoned, but that his arrest was at hand. The imminence of the danger was the sole motive for the execution of the mortgage. In any other view of the transaction, her haste is incomprehensible. Notwithstanding the importance of the demand made upon her, she took no time to reflect, held no consultation with her friends, sought no advice. Her one object was to act quickly, — to be beforehand. And yet this notion of the imminence of her husband's arrest was just the one part of the impression produced upon her mind by Lomerson's statements, which was false, and which he knew to be false. From this time on the case becomes one of false representation, not because falsehoods were stated as if they were facts, but because the state of mind produced falsely represented the facts. To take advantage of such a state of mind is to profit by a false representation.

The decree below is affirmed, with costs.

FRAUD — FALSE REPRESENTATIONS. — As to what representations are deemed fraudulent, see note to *Cottrell v. Krum*, 18 Am. St. Rep. 555-563. If a party intentionally produces a false impression by words or acts, in order to mislead or obtain some undue advantage, it is a case of manifest fraud: *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717.

COLLINS v. VOORHEES.

[47 NEW JERSEY EQUITY, 215.]

MARRIAGE CONTRACTED WHILE A PREVIOUS MARRIAGE OF THE HUSBAND REMAINS UNANNULLED, though he had previously obtained a void decree of divorce in another state, has no legal force whatever.

A VALID MARRIAGE WILL NOT BE PRESUMED TO HAVE TAKEN PLACE BETWEEN PARTIES WHO LIVED TOGETHER AS HUSBAND AND WIFE under a ceremony of marriage, when the man intended to deceive the the wife by a pretended marriage, and knew that he was not competent to marry, because the decree purporting to divorce him from his wife was a nullity, although the parties to the second marriage continued to live together as husband and wife after the first wife had procured a valid divorce from the husband, and therefore after he had capacity to contract a valid marriage.

WHEN the case was first determined in the court of appeals the decree of the vice-chancellor was affirmed, but no opinion in support of the affirmance was published. Judge Garrison delivered a dissenting opinion, in which he insisted that the matrimonial conduct of the parties after the impediment to their marriage had been removed gave rise to a presumption that they thereafter assented to a valid marriage. A motion for a reargument having been made, it was denied, and the following opinion thereupon delivered.

Cortlandt Parker, for the motion.

BEASLEY, C. J. This motion is refused, and the record is ordered to be remitted.

Inasmuch as it appears that counsel has misconceived the ground on which this case was decided by this court, it seems proper that I should state that ground as it was understood by me.

This court was called upon to apply the law to the following facts, viz.: In the year 1867 one Abraham Voorhees brought suit in the superior court of Connecticut for divorce against his wife, Camilla, for desertion. This proceeding was a fraud from beginning to end, on the part of the plaintiff. No notice of it was given to the wife, who at the time was a resident of this state, and consequently, according to the decision of this court in the case of *Doughty v. Doughty*, 28 N. J. Eq. 581, the decree that ensued was in this jurisdiction an absolute nullity.

This being the situation, Voorhees married a second time, and the question to be decided was with respect to the validity of this latter marriage.

On that subject this court held, in the first place, that inasmuch as the divorce granted in Connecticut was absolutely void in this state, such second marriage had no legal force whatever. This was a necessary conclusion, as long as the case just cited remained unreversed. But another question arose. It appeared that after this second marriage the first wife obtained a divorce from her husband, and that subsequently to that occurrence Voorhees cohabited with his so-called second wife, and treated her before the world as though he were married to her. And it was urged that such cohabitation formed the basis of an inference that there had been an interchange of consent to marriage after the dissolution of the first marriage.

This inference was rejected by this court on two grounds.

First, that an interchange of consent was not to be deduced from cohabitation accompanied with matrimonial habit and repute, in a case wherein it appeared that the parties had been living together as husband and wife by force of a ceremonious marriage, to which as a valid act one of the parties in point of fact had not assented.

The court found as a fact in this case that the husband, Voorhees, knew that he had no legal power or right to contract this second marriage; that he was aware that the divorce fraudulently obtained by him was a nullity; what he did consent to was to deceive the so-called second wife, and to live with her with the appearance of being married to her; he did not consent to marry her in any legal sense whatever. Under these circumstances, this court decided that his continued cohabitation with this woman, after the obstacle to their marriage had been removed, did not prove that he had changed his original intent, which was to live with her without being legally married to her. It was deemed that cohabitation, with habit and repute being accompaniments of the original *status*, could not *per se* be taken as proof that a new *status* had been agreed to by the parties. Voorhees, as just stated, had consented to an illegitimate connection, attended with the concomitants of habit and repute. The continuance of such concomitants could not, by their unassisted probative force, lead, with any show of reasoning, to the conclusion that the man, when he was at liberty to form a legal connection with the woman, had embraced the opportunity. To treat evidence which was in all respects and to the utmost degree in accord with the original purpose as

proving, *propria vigore*, a change of such purpose, appeared to be not only inadmissible according to legal rules, but as being in logic ridiculous.

This construction of the evidence, it was believed, stood opposed to but a single case, which is that of *Breadalbane Peerage*, reported in L. R. 2 H. L. S. 269. The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous, and, as it seems to me, it was properly rejected by this court. In that case the court acted upon the principle that if a man and a woman agreed to live together adulterously, with a simulation of marriage, that there should be an inference of a subsequent valid marriage, from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence the adulterous purpose is converted into a matrimonial purpose, without a particle of reasonable evidence in support of the alleged change of intention. Such a course is opposed, as it seems to me, to morals and public policy. Lord Westbury read the opinion in the case, and he has no better reason to offer in favor of the principle adopted than that he can find no ruling the other way. He does not pretend that he can find anything in its favor, and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery, their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations; for when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequent to the removal of such impediment, is the carrying into effect by the parties of their original purpose; but when the original purpose was to live in adultery, the evidence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest.

Nor in the present case would the result have been varied

if the rule thus rejected had been adopted; for the evidence before the court, reasonably construed, would have been deemed to be opposed to the contention of appellants.

The proofs on the subject amount to demonstration. The second wife was one of the witnesses in the cause, and she testified that she never knew, or had the least intimation, until after the death of her husband, that the validity of their marriage was in any respect called in question; and when she was asked, "Was any other marriage ceremony ever performed in which you and Abraham Voorhees were the contracting parties?" her answer was, "There was not." Further than this, she was then fully examined by her own counsel, and she made no pretense of any other interchange of consent to marriage between herself and the man she cohabited with except such as had been given at the time of their ceremonious nuptials. Most certainly this evidence, if we apply to it the ordinary legal tests, is entirely conclusive, and absolutely proves that there never was any second marriage, in any form whatever, between these parties. It is to be borne in mind that cohabitation, with matrimonial habit and repute, is, standing alone, nothing more than testimony in proof of marriage; the conduct of the persons to whom it relates does not constitute marriage, and consequently, from its evidential nature, it is liable to be rebutted by other proofs. This, as has been already said, was done in the present instance.

MARRIAGE AND DIVORCE — SECOND MARRIAGE, WHEN PREVIOUS MARRIAGE REMAINS UNANNULLED: See note to *Smith v. Smith*, 46 Am. Dec. 130-134; note to *Gathings v. Williams*, 44 Am. Dec. 54, 55; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105.

MARRIAGE AND DIVORCE — EVIDENCE. — As to when a marriage will be presumed from cohabitation of the parties, and when not, see note to *Appel of Reading Fire Ins. Co.*, 57 Am. Rep. 451-453; *Jenkins v. Jenkins*, 83 Ga. 282; 20 Am. St. Rep. 316, and note.

BENNETT v. VAN RIPER.

[47 NEW JERSEY EQUITY, 502.]

THE WORD "RELATIONS," when used in wills and statutes, is ordinarily construed as including relatives by consanguinity, and excluding relatives by affinity, unless a contrary intention is manifested.

DEFINITION OF THE WORDS "RELATED TO." — If a statute permits a beneficiary member of a society to designate a person "related to and dependent upon" him, who shall be entitled, under certain conditions, to draw from the society a sum named, a relative by affinity, if selected by the member, is entitled to draw such sum.

Samuel Kalisch, for the appellant.

Charles E. Hill, for the respondents.

SCUDDER, J. On the death of Alonzo Van Riper, a member of Alpha Council No. 8, of New York, a duly constituted branch of the Supreme Council of the Order of Chosen Friends, a benefit certificate for the sum of three thousand dollars became payable. He had, in his lifetime, named as the beneficiaries under said policy his grandson, Raymond Van Riper, for one thousand dollars, and Martha C. Bennett for two thousand dollars. She is the wife of Lewis W. Bennett, a grand-nephew, by consanguinity, of Alonzo Van Riper, deceased. After his death, on claim made by the children and representatives of the deceased, a bill of interpleader was filed by the council, and on decree to interplead, an issue between the parties defendant was formed, and a decree entered against Martha C. Bennett, who has taken her appeal therefrom to this court. Her right is based on the certificate above mentioned, which is a duly authenticated relief-fund certificate of the order. By the Revised Statutes of Indiana authorizing the incorporation of such societies (sec. 8850), a certificate of membership, policy, or other evidence of interest shall be regarded as a contract, and the names of payees and beneficiaries may be changed on such terms and conditions as the parties to the contract may agree. By section 8 of the articles of association of the supreme council of the order, one of the principal objects shall be to establish a relief fund, from which members of this association who have complied with all its rules and regulations, or persons by such members lawfully designated, or the legal heirs of such members, may receive a benefit in a sum not exceeding three thousand dollars, on satisfactory proof of death, and conditions complied with. By article 1 of the relief-fund law, "each

beneficiary member, the person or persons designated by said member related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw a sum not exceeding the amount named in his or her certificate, as thereafter specified."

Taking these different parts of the contract together, the question to be determined is, Does the intended beneficiary, Martha C. Bennett, come within its terms, so as to entitle her to the payment of two thousand dollars under the certificate? It is not claimed that she was dependent upon the deceased, but her claim is, that she was related to him, within the meaning of the contract. I think there was error in confining the meaning of this term "related to" within the narrow limit which has been adopted in the construction of wills and in some statutes. From the indefinite extent of the word "relations," it has been found necessary to limit it in these cases by confining it to the next of kin under the statute of distributions: *Smith v. Campbell*, 19 Ves. 400; *Bennett v. Honeywood*, Amb. 708. This includes relations by blood, and not by affinity, and is applied, unless the testator has subjoined to the gift expressions declaratory of an intention to include them: 2 Jarman on Wills, 666; *Esty v. Clark*, 101 Mass. 86; 3 Am. Rep. 320. In Bacon on Beneficial Societies, sec. 280, it is said: "It has long been settled that the word 'relatives,' when used in a will or statute, includes those persons who are next of kin under the statute of distributions, unless from the nature of the bequest, or from the testator having authorized a power of selection, a different construction is allowed": *Mahon v. Savage*, 1 Schoales & L. 111; cases in notes to *Harding v. Glyn*, 1 Atk. 469, 3 White and Tudor's Lead. Cas. 810; *Drew v. Wakefield*, 54 Me. 291. In this certificate there is a power of selection given, not by will, but by the contract between the parties. There are, therefore, qualification to this rule of construction, even in cases of wills, when a contrary intention is manifested. There can be no question about the intention of the holder in this case upon the face of the certificate. In *Craik v. Lamb*, 1 Coll. C. C. 489, 495, Vice-Chancellor Shadwell says that "in Johnson's Dictionary, in Richardson's Dictionary, and in Bailey's Edition of Facciolati, the word 'relations' is treated as extending to affinity; and the expressions 'a relative by marriage' and 'a relation in the law,' as denoting connections by affinity, are popularly, whether cor-

rect or incorrect, of occasional, if not of frequent, use." In our more modern dictionaries we find that a "relation" or "relative" is defined as a person connected by blood or affinity. When used in a contract, as in this case, I do not find that it has such a fixed and definite meaning that we must thwart the purpose of this decedent, who supposed that, by the terms of the article giving him control of his benefit in the relief fund, he could bestow it on any one of those popularly called relatives whom he might select. It seems also that a liberal rather than a restricted meaning given to the word "relative," used in this article of the association, would better comport with its benevolent purpose. The construction contested for against this certificate would exclude a member's wife, unless she came within the other part of the phrase by being dependent on him for her support. The ties of affinity are often stronger than those between collateral or even lineal kinsmen by blood; and there is nothing unreasonable in saying that this certificate was made payable to one whom the holder supposed was properly classed among his relatives, and that the council so intended. Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then "the best construction," says Chief Justice Gibson, "is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention": *Schuylkill Navigation Co. v. Moore*, 2 Whart. 491.

It seems that the objects of this association will be best attained by the adoption of a common, though it may be an inexact, interpretation of the words "related to," as used in the article above referred to, rather than by a restricted meaning that may not have been known, and is certain to defeat the purpose of this deceased member, and that no rule of legal construction will be violated by giving it such meaning.

For this reason the decree will be reversed.

WILLS, CONSTRUCTION OF WORDS IN — "RELATIONS." — For the meaning and significance of the word "relations," as used in a will, see *Oleaser v. Oleaser*, 30 Wln. 96; 20 Am. Rep. 20.

PENNINGTON v. TODD.

[47 NEW JERSEY EQUITY, 509.]

AFFIRMANCE OF AN INTERLOCUTORY DECREE ON APPEAL CANNOT be construed as an affirmance as to errors of which the appellants had no cause of complaint, and therefore another party prejudiced by those errors may prosecute a subsequent appeal based thereon.

APPEAL FROM A FINAL DECREE IN CHANCERY BRINGS UP THE WHOLE CASE FOR REVIEW, with all interlocutory orders involving the merits of the controversy.

ACCOUNTING FOR PARTNERSHIP PROFITS ACQUIRED BY FRAUD.—A member of a firm established for the conduct of a lawful business is not entitled to withdraw profits acquired by him in partnership transactions, on the ground that he acquired them by cheating customers of the firm, when the member calling on him for an accounting is innocent of all fraud.

Eugene Stevenson and Joseph D. Bedle, for the appellants.

John W. Griggs, for the respondent.

DIXON, J. Joseph C. Todd, the complainant, and Philip Rafferty, whose administrators are defendants, formed a partnership in January, 1859, to conduct the business of manufacturing and selling machinery, and also a general commission and agency business for the purchase and sale of machinery and railroad supplies. In July, 1872, the partnership was dissolved by Mr. Rafferty's death.

During the existence of the partnership Mr. Rafferty carried on a part of its business secretly, without entering it on the books of the firm, and appropriated the profits thereof to his own use.

In March, 1876, the present bill was filed to obtain an account of this secret business and a share of the profits. In February, 1879, an account was decreed, and a reference made to a master to state the same. In May, 1883, the master reported the account, which, after exceptions by the defendants, was substantially confirmed by final decree July 18, 1889. Thereupon the defendants appealed to this court, contending that in the account the complainant was allowed a share of gains unlawfully made by Rafferty, and that this was erroneous.

It appears that the secret business consisted of transactions with certain California houses, in some of which Rafferty, while ostensibly acting as purchasing agent for these houses and charging them commissions for his services, billed the purchased goods to his principals at prices greater than the

cost, and so defrauded them of the difference. In decreeing an account, the court of chancery refused to meddle with these fraudulent gains, and directed the master to allow the complainant a share of only such profits as were lawfully made by his partner: *Todd v. Rafferty's Adm'rs*, 30 N. J. Eq. 254. The administrators appealed from the interlocutory decree for an account, insisting that they were not chargeable at all with respect to the secret business, but that decree was affirmed by this court for the reasons given in the court below: *Rafferty's Adm'rs v. Todd*, 34 N. J. Eq. 552.

The affirmance of the interlocutory decree on the appeal of the defendants did not finally decide any equitable questions except such as were then passed on by this court. These could lawfully be only those features of the decree which might constitute a grievance to the appellants, and were therefore complained of by them: *Green v. Blackwell*, 32 N. J. Eq. 768. In fact, only those portions of the decree were considered. They did not embrace the clause exonerating the administrators from any obligation to account for gains unlawfully made by Rafferty.

Nor does the interlocutory decree itself finally dispose of such obligation as the case now stands. It is a settled rule in this court that an appeal from a final decree in chancery brings up for review the whole case, with all interlocutory orders involving the merits of the controversy: *Crane v. De Camp*, 22 N. J. Eq. 614; *Decker v. Ruckman*, 28 N. J. Eq. 614; *Clair v. Terhune*, 35 N. J. Eq. 336.

When, therefore, the administrators now appeal from the final decree, on the ground that they are thereby improperly charged with gains fraudulently made by Rafferty, we must consider and decide whether in equity they ought to be so charged.

The question, barely stated according to the conceded facts, is this: When an innocent member of a firm established for the conduct of a lawful and moral business calls upon his partner for a share of profits made in partnership transactions, is the partner absolved from the duty of dividing, if he shows that he realized the profits by cheating the customers of the firm?

For an affirmative answer to this question no support is found in the cases of *Watson v. Murray*, 23 N. J. Eq. 257, and *Gregory ads. Wilson*, 36 N. J. L. 315, 13 Am. Rep. 448, upon which alone the learned vice-chancellor relied in mak-

ing the interlocutory degree. In the earlier case the very business for the conduct of which the partnership existed was deemed illegal or immoral, and in the later case the plaintiff participated in the unlawful design by which the money sued for was gained. And so far as I have discovered, whenever any court has applied the maxim, *Ex turpi causa, non oritur actio*, it has based its judgment on the turpitude of the plaintiff. "The objection," said Lord Mansfield in *Holman v. Johnson*, Cowp. 343, "that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, — by accident, if I may so say. The principle of public policy is this: *Ex dolo malo, non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

But when the plaintiff is blameless, and the contract on which he stands is legal and moral, no court has ever permitted a defendant to escape responsibility because of his own misconduct. "It is an indisputable proposition," says Mr. Broom (Legal Maxims, 352), "that, as against an innocent party, no man shall set up his own iniquity as a defense any more than as a cause of action." The same sentiment was put in striking antitheses by Rooke, J., in *Farmer v. Russell*, 1 Bos. & P. 296, 301, to this effect: the doctrine that if a defendant be innocent he shall be answerable, if guilty he shall be free, that his innocence shall work a loss to him, his guilt shall be his indemnity, is so monstrous as to be accounted for only on the ground of mutual privity in a foul transaction.

An examination of the authorities will show that while courts have uniformly admitted the impolicy of aiding plaintiffs in furtherance of their tainted schemes, yet they have not been unmindful of the added immorality of defendants in

seeking to wrong plaintiffs also because of their own turpitude, and hence they have been sometimes perhaps too ready to perceive distinctions between the plaintiff's claim and his improper acts in which it originated, so that a base defense might be defeated. This tendency received some adverse criticism in the New Jersey decisions above mentioned, on the ground that courts ought to proclaim the outlawry of such affairs from the first step to the last, not for the sake of the defendant who would cheat his associate in guilt, but in order to render the transactions as precarious and difficult as possible to those who might be inclined to enter upon them. This, undoubtedly, is the ultimate reason on which courts act when they refuse to aid plaintiffs engaged in forbidden or nefarious enterprises.

But a denial of assistance to the present complainant can rest on no such basis. The law has no desire to deter parties from doing anything which the complainant has done. On the other hand, a refusal to aid him would furnish an incentive to such frauds as the defendants' intestate perpetrated; for if a partner, by showing that he has cheated the customers of the partnership in all his dealings with them, can retain all the profits instead of only half, his temptations to iniquity are doubled.

There exists, then, no just reason for discharging the defendants from the duty of accounting to the complainant for all gains made by their intestate in the firm's business, according to the contract of partnership. That such contract embraced gains unlawfully realized is manifest from the incontrovertible proposition that on the receipt of such gains the complainant, as well as his delinquent partner, became responsible for them to their defrauded customers. Not that the parties in making the contract actually contemplated the sharing of unlawful gains, but they did not expressly exclude such participation; and because the law implies in the contract the duty of sharing the burdens which such gains impose, it implies also mutuality in the benefits conferred,—*qui sentit onus sentire debet et commodum*.

The decree appealed from should be affirmed.

PARTNERSHIP — ACCOUNTING. — It is the duty of a partner to account to his copartners for all funds arising from the sale of partnership property which come into his hands: *Langel v. Langel*, 17 Or. 221.

PARTNERSHIP — AGENCY. — In a commercial partnership, each partner is, in contemplation of law, the general and accredited agent of the partnership,

and may bind all the other partners by his acts in all matters within the scope and objects of the partnership: *National etc. Bank v. Noyes*, 62 N. H. 35. An agent receiving money under an illegal contract must account therefor: *Lemon v. Grosstopf*, 22 Wis. 447; 99 Am. Dec. 58, and extended note; *Floyd v. Patterson*, 72 Tex. 202; 13 Am. St. Rep 787, and note. Agents or partners cannot make money out of their principals or copartners, for whom they have undertaken to act: *Simons v. Vulcan etc. Co.*, 61 Pa. St. 202; 100 Am. Dec. 622, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CARNWRIGHT v. GRAY.

[127 NEW YORK, 92.]

CONSIDERATION, PROMISSORY NOTE, WHETHER NEGOTIABLE OR NOT, IMPORTS.— A promissory note, whether it is negotiable or not, imports a consideration. It is not necessary, therefore, to express a consideration therein, nor is it necessary, in an action thereon, to allege or prove a consideration. The burden of showing a want of consideration is upon the defendant.

PROMISSORY NOTE PAYABLE AFTER DEATH OF MAKER IS VALID INSTRUMENT.— A promissory note, although by its terms payable after the death of the maker, is a valid instrument, where it contains a promise to pay a sum certain at a specified time after his death.

ACTION on a promissory note. The instrument sued on was in the following words and figures:—

“QUARRYVILLE, September 2, 1871.

“Thirty days after death, I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest.

“SAMUEL P. FRELIGH.”

The plaintiff gave no evidence of the actual consideration of the instrument, but having offered testimony tending to prove the genuineness of the maker's signature, put the note in evidence, and rested his case. Other facts are stated in the opinion.

Peter Cantine and John J. Linson, for the appellants.

F. L. Westbrook and J. Newton Fiero, for the respondent.

BROWN, J. When the plaintiff rested his case, and again at the close of the testimony, the defendant moved to dismiss the

complaint, upon the ground that no proof had been given that the instrument sued upon had any consideration. These motions were denied, and the court instructed the jury that the instrument was a promissory note and imported a consideration, and that the burden rested upon the defendants to show that it was without a consideration.

The exceptions to these rulings present the principal question argued upon this appeal.

The statute of this state in reference to promissory notes provides as follows (1 Rev. Stats. 768):—

“Sec. 1. All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants.”

“Sec. 4. The payees and indorsees of every such note payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise.”

Our statute is a substantial re-enactment of the statute of Anne (8 & 4 Anne, c. 9) which provided that “all notes signed by a person, promising to pay to another, his, her, or their order, or to bearer,” should be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, etc.

This statute was held by the courts of England to include within its terms a non-negotiable note: *Smith v. Kendall*, 6 Term Rep. 123; *Burchell v. Slocock*, 2 Ld. Raym. 1545; 8 Kent's Com. 77.

In the case first cited, Lord Kenyon said: “A note may be made payable to A or bearer, A on order, or to A only.” Similar decisions were made by the courts of this state under our own statute: *Downing v. Backenstoos*, 3 Caines, 137; *President v. Hurin*, 9 Johns. 217; 6 Am. Dec. 273; *Kimball v. Huntington*, 10 Wend. 675; 25 Am. Dec. 590; *Hall v. Farmer*, 5 Denio, 484.

In *Downing v. Backenstoos*, a non-negotiable note was declared on as within the statute, and the defendant demurred, on the ground that the declaration did not allege the transaction and consideration upon which the note was given. The

court gave judgment for the plaintiff, saying: "The very point was settled in *Green v. Long* (April term, 1798), in conformity to the adjudications in Westminster Hall."

In *President v. Hurtin* it was said: "The note set forth is a good promissory note within the statute, though it has no words 'bearer or order.' This is the established English law, and the same rule is recognized by this court."

In *Kimball v. Huntington*, the action was upon a due-bill in this form: "Due Kimball and Kenston \$825, payable on demand." Judge Nelson said: "The instrument is a promissory note within the statute. Neither the acknowledgment of value received or negotiable words are essential to bring it within the statute." See also *Carver v. Hayes*, 47 Me. 257; *Franklin v. March*, 6 N. H. 364; 25 Am. Dec. 462.

No authority is cited in the courts of this state or of England holding that a non-negotiable note is not within the terms of the laws cited, and we are of the opinion that the language of our statute includes a note payable to a person without words of negotiability.

The instrument sued upon being, therefore, a promissory note within the statute of this state, it follows that it imports a consideration. By the express terms of the statute the sum of money therein mentioned is declared to be "due and payable as therein expressed." That it is "due and payable" according to its terms is the legal conclusion which the court must draw from the instrument itself. A valid contract is thus declared to exist, and of course a consideration must be implied. Hence "value received" need not appear on the face of the note, as those words express only what the law implies: *Hatch v. Traves*, 11 Ad. & E. 702; *Hall v. Farmer*, 5 Denio, 484.

The effect of laws which make promissory notes negotiable, or which authorize actions of debt upon them though non-negotiable, is to take them out of the common-law rule which requires that every contract must be shown by the party who sues upon it to be supported by a consideration, and enables the holder to maintain an action thereon without alleging or proving a consideration. In other words, a consideration is implied from the character of the instrument: *Peasley v. Boatwright*, 2 Leigh, 195; *Hatch v. Traves*, 11 Ad. & E. 702.

The English statute was enacted to settle the controversy that prevailed, whether under the customs of merchants promissory notes were negotiable.

They were thereby declared to be assignable or indorsable over in the same manner as inland bills of exchange were according to the customs of merchants, and holders were empowered to maintain actions thereon in the same manner as they might do upon any inland bill of exchange made or drawn according to the custom of merchants.

Our statute contains similar provisions. Promissory notes and inland bills of exchange were by virtue of these laws put upon an equality. They were made negotiable if they contained words of negotiability, but whether negotiable or not, and whether they expressed value received or not, it was no longer necessary in actions thereon to aver and prove consideration.

Such was and is the rule as to inland bills of exchange: 1 Daniel on Negotiable Instruments, sec. 161; *Raubitschek v. Blank*, 80 N. Y. 479; *Averett's Adm'rs v. Booker*, 15 Gratt. 163; 76 Am. Dec. 203; *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

And the same rule under the statute was made applicable to promissory notes: *Townsend v. Derby*, 8 Met. 363; *Dean v. Carruth*, 108 Mass. 242; *Bank of Troy v. Topping*, 9 Wend. 277; 13 Wend. 557; Chitty on Bills, 9th Am. ed., 78-181; *Paine v. Nalke*, 57 How. Pr. 273; Story on Promissory Notes, sec. 51; 3 Kent's Com. 77, 78; 1 Parsons on Contracts, 6th ed., 249; 1 Parsons on Bills, 193.

The statute does not require a note to express value received upon its face, and no definition of such an instrument requires the expression of that fact.

The note sued upon, although by its terms payable after the death of the maker, was a valid instrument.

A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time, or on demand: Story on Promissory Notes, sec. 1; *Coolidge v. Ruggles*, 15 Mass. 387.

It must contain the positive engagement of the maker to pay at a certain definite time, and the agreement to pay must not depend on any contingency, but be absolute and at all events.

Tried by this standard, the instrument set out in the complaint was a valid promissory note. The fact that it was payable after the death of the maker did not affect its character: 3 Kent's Com. 76.

It follows from these views that the motion to dismiss the complaint was properly denied, and there was no error in the charge of the court.

The point made by the appellant, that the court erred in its charge as to the burden of proof on the question of consideration, assuming that evidence *pro* and *con* upon that question was given, was not raised at the trial. The proposition made by the defendant at the close of the judge's charge, and the only one to which an exception appears in the record, was as follows: "In order that there may be no doubt about our position, we ask the court to charge the jury that there has been no evidence given of consideration, and to direct a verdict for the defendant upon that ground."

The defendant, having thus squarely planted himself on the ground that there was no evidence of consideration, and asked the court to direct a verdict in his favor, cannot now claim that there was evidence for the jury, and that he was entitled to a different instruction from that given.

The defendant's claim all through the trial was, that the note did not import a consideration, and that the plaintiff could not recover without proof of that fact, and his motion to dismiss the complaint and to direct a verdict in his favor, and his exceptions to the charge, all sharply present that question; but he nowhere claimed that he had given evidence which, if believed by the jury, overcame the presumption arising in favor of the note.

This clearly appears from the statement I have quoted.

The exceptions to the admission of evidence present no error, and the judgment should be affirmed.

PROMISSORY NOTE—CONSIDERATION—NECESSITY FOR IT TO BE EXPRESSED.—A written promise to pay a certain sum of money at a certain time is a valid promissory note, and depends for its validity upon the implied promise of the payee to furnish the stipulated consideration: *Siegel v. Chicago etc. Sav. Bank*, 131 Ill. 569; 19 Am. St. Rep. 51. And where no consideration is recited, extrinsic evidence may be admitted to show that there was consideration: *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620. Possession of a draft is *prima facie* evidence of title and consideration: *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327, and note; *Hubble v. Fogarty*, 3 Rich. 413; 45 Am. Dec. 775. A promissory note imports a consideration. The burden of proof is on one alleging want of consideration: *Tolbert v. McBride*, 75 Tex. 95; *Flint v. Phipps*, 16 Or. 437; *First Nat. Bank v. Anderson*, 28 S. C. 143; *Andrews v. Hayden*, 88 Ky. 455; *National U. Bank v. Todd*, 132 Pa. St. 312; *Chapman v. Remington*, 80 Mich. 552; *County of Montgomery v. Auchley*, 92 Mo. 126.

IN THE MATTER OF THE WILL OF BOOTH.

[127 NEW YORK, 100.]

NAME WRITTEN IN BODY OF INSTRUMENT NOT PRESUMED TO BE SIGNATURE.

— When a testator, or the maker of a contract, subscribes a will or contract at the end and in the manner in which instruments are usually signed, a presumption arises that he affixed his name as a signature thereto; but when the name is written in the body of the instrument, where a name is usually inserted as descriptive of the person who is to execute it, and rarely as a signature, no such presumption arises; and to make it a valid signature, it must be shown that it was written with intent to make it his signature. Where, therefore, a testatrix writes her name at the beginning only of an alleged will, but there is no evidence to show that, directly or indirectly, by word or gesture, she referred to her name thus written as her signature, nor evidence of any act on her part from which it might be inferred that her name there written was intended to be in execution of a completed will, a finding or judgment that such name was there written with intent that it should have effect as her signature in final execution of a will, cannot be sustained, although it is proved that she said to one of the subscribing witnesses: "This is my will; take it and sign it."

CECILIA L. BOOTH, a resident of the state of New Jersey at the time, wrote in her own hand the following paper: —

"If I, Cecilia L. Booth, should die within the year 1884, I leave to my sister, Geraldine Josephine Timoney, all money due me from my late father's, deceased, will, also my wearing apparel and furniture, and I also leave to my little nephew, Albert Philip Timoney, all money deposited in the Emigrant Savings Bank in my maiden name, Cecilia L. Hatfield.

"Witnessed by, —

"**AMELIA KURRUS.**

"**MAMIE CLIFFORD.**

"June 16, 1884."

On the 10th of August, 1884, Mrs. Booth, then a citizen of the state of New Jersey, died in that state, leaving personal property in the city and county of New York. Geraldine Josephine Timoney presented the instrument for probate in the surrogate's court of the city and county of New York, and the surrogate held that it was well executed under the laws of New Jersey, and admitted it to probate as the last will and testament of the deceased. The husband of Mrs. Booth, who contested the probate, appealed to the general term, where the surrogate's decision was reversed, and a new trial by a jury was directed. Eight questions were propounded to the jury, all of which were answered in favor of the validity of the will. The fifth question so propounded was as follows:

"5. If the name 'Cecilia L. Booth' was written by Cecilia L. Booth, deceased, did she acknowledge the writing or making thereof in the presence of two witnesses, who were present at the same time, and who subscribed their names to said paper as witnesses in the presence of said Cecilia L. Booth?" The proponent applied for a judgment at the general term, which was denied, and the contestant applied for a new trial, which was granted, on the ground that the answer to the fifth question was not sustained by the evidence. Upon the second trial by jury, all the issues were again found in favor of the proponent, but the general term again denied proponent's motion for judgment, and directed a new trial of the fifth question only. Upon the third trial by jury, they were directed to answer the fifth question in the negative. On appeal to the general term, the direction was sustained, and the paper was held not to be entitled to probate. Other facts are stated in the opinion.

J. Stewart Ross, for the appellant.

B. F. Watson, for the respondent.

FOLLETT, C. J. At common law, if a person wrote his name in the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument: *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286; *sub nom. Clason v. Bailey*, 14 Johns. 484; *People v. Murray*, 5 Hill, 468; *Caton v. Caton*, 2 H. L. Cas. 127; 2 Kent's Com. 511; 1 Dart on Vendor and Purchaser, 6th ed., 270; 1 Bigelow's Jarman on Wills, 79.

We shall assume, without deciding, that under the laws of New Jersey a will may be legally executed if the name of the testator is written by him in the body of the instrument with intent to so execute it. The statute of that state which prescribes the mode in which wills shall be executed provides: "All wills and testaments . . . shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." Under this statute it was held in *In re McElwaine*, 18 N. J. Eq. 499, that "four things are required: 1. That the will shall be in writing; 2. That it shall be signed by the testator; 3. That such signature shall be made by the testator, or the

making thereof acknowledged by him in the presence of two witnesses; 4. That it shall be declared to be his last will in the presence of these witnesses. Each and every one of these requisites must exist. They are not in the alternative. The third requisite contains an alternative, but one of these alternatives must exist. The second requisite, the signing by the testator, must exist. The second alternative of the third, to wit, that he acknowledged 'making of the signature' will not supply the want of the second. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that he made it, and would prove compliance with the requisite of signing by him. But when it is clear that the testator did not sign the will, this acknowledgment is not sufficient. The words of the act are clear, and the object is equally clear, and requires this construction to the words." This language was used in respect to a will to which the name of the testatrix was subscribed by one of the subscribing witnesses at her request, in her presence, and in the presence of both subscribing witnesses. After this was done, the testatrix said "that was her name and seal," but did not acknowledge it to be her signature, nor did she then declare that the instrument was her will; and it was held not to have been executed in accordance with the statute.

Wherever the name of a testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it, otherwise it is without force. When a testator, or the maker of a contract, subscribes it at the end and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent.

The record contains no evidence tending to show that Mrs. Booth, directly or indirectly, by word or gesture, referred to her name in the first line of the paper as her signature, nor is there evidence of any act on her part from which it might be inferred that the name there written was intended to be in execution of a completed will, and her simple declaration to Mamie Clifford, one of the subscribing witnesses, "This is

my will; take it and sign it,"—standing alone, is insufficient to sustain a finding or verdict that the name "Cecilia L. Booth," written by her in the first line of the document, was there written with intent that it should have effect as her signature in final execution of a will.

We are referred by the learned counsel for the appellant to *In re Higgins*, 94 N. Y. 554, *In re Phillips*, 98 N. Y. 267, and *In re Hunt*, 110 N. Y. 278, in which it was held that when a testator subscribes a will at the end, and exhibits it and the signature to the subscribing witnesses, declares it to be his last will and testament, and requests them to sign it as witnesses, it is a sufficient acknowledgment of the signature. Those cases are quite different from the one at bar, in this: The signatures having been subscribed at the end, in the usual way in which instruments are finally authenticated, the legal presumption arose that the signatures were written for the purpose of finally executing the documents; but as we have before shown, there is no legal presumption arising from the face of this instrument that the name was written as a signature, nor is there evidence outside of the paper from which such an inference can be safely drawn. It has been the object of the statutes of the various states prescribing the mode in which wills must be executed to throw such safeguards around those transactions as will prevent fraud and imposition, and it is wiser to construe these statutes closely, rather than loosely, and so open a door for the perpetration of the mischiefs which the statutes were designed to prevent.

The judgment and orders appealed from should be affirmed, with costs, payable out of the estate.

WILLS — SIGNATURE. — The rule seems to be, that the testator's signature must appear at the end of a will, not in the body thereof, in order that the will may be deemed properly signed: *Wineland's Appeal*, 118 Pa. St. 87; 4 Am. St. Rep. 571; *Younger v. Duffie*, 94 N. Y. 535; 46 Am. Rep. 156; *Grebill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Chaffes v. Baptist Mission of New York*, 10 Paige, 85; 40 Am. Dec. 225, and note.

COLVILLE v. MILES.

[127 NEW YORK, 189.]

TITLE TO PRODUCTS OF LEASED FARM IN LESSEE WHEN. — Where a farm is leased with stock thereon, in which the landlord and the tenant have a joint interest, the tenant agreeing to raise enough on the farm to feed the stock, and if enough is not raised to buy whatever may be necessary, the title to hay, oats, and straw raised on the farm is in the tenant, and the landlord cannot recover in an action of replevin brought by him against an officer who has levied on such products by virtue of attachments against the tenant.

REPLEVIN brought to recover a quantity of hay, oats, and straw grown by a tenant on a farm owned by the plaintiff, which was leased with stock in which the landlord and the tenant were jointly interested. The tenant left the farm owing the landlord and various other persons. The defendant, a constable, seized the property in question under warrants of attachment issued by a justice of the peace. The sheriff took the property under the writ in this action, and subsequently delivered it to the plaintiff. On the trial the value of the property was assessed at one thousand dollars, and the title was found to be in the plaintiff. Other facts are stated in the opinion.

M. N. Kane, for the appellant.

John Vincent, for the respondent.

FOLLETT, C. J. Frequently the title to the products of lands leased for agricultural purposes is reserved by the lessor, or a lien is created as security for the payment of rent, but no such claim is put forward in this case. It is not asserted that the landlord and tenant owned the products jointly, and title was in the one or the other in severalty.

This action was brought and maintained on the theory that the plaintiff held the legal title to the property in question. The only witness who gave evidence in support of the action was the plaintiff, who testified: "As near as I can recollect, he (Kane) was to take charge of the stock; he was to raise enough stuff on the place to feed the stock; and if there was not enough to carry them through the year, he was to buy what was necessary to carry it out, which he has not been doing for the last two years; the stuff was not to be sold; there was forty odd heads of cattle; you do not raise stuff to sell when you have cattle. . . . The hay and grain were not to be removed; it was not raised to sell; it belonged to the cattle. Q. Did you

have any interest in the farm after you made the lease to Mr. Kane, or the products of it in any way? A. No, I gave that up with the lease of the cows; I leased the cows and I leased everything. I gave him all that the ground produced; I never received any of the products for the sale of young stock or produce sold from said farm. I never gave any direction about working the farm, or made any inquiry of Kane as to what he was using on the farm or what he sold off the farm. I did not care, so long as he raised the milk; I told him he could use anything he wanted, except the stock. I was entitled to two thirds of the stock when it was sold; he sold it all and pocketed it, and I never got my two thirds; . . . he put on seven cows; he kept sheep on the farm; I do not know what he did with them; . . . when the farm was leased the hay and grain was not mentioned at all; he was to raise enough stuff on the farm to keep the cattle; if there was not enough raised on the place, he was to buy what was requisite; what was raised on the place was to be fed to the cattle; . . . there was no conversation particularly in which anything was said about feeding the cattle from the products raised on the farm; he was to raise the stuff and support the cattle; if the place did not support the cattle, he was to buy whatever was necessary; that was the agreement; I cannot state what he said; I am stating what I said; I said it, and he agreed to it." This is all of the testimony given in behalf of the plaintiff which tends to show that he reserved the title to the products of the farm. The tenant, and a witness who heard the bargain, testified that it was not agreed that the crops were to be fed on the place, and that no reservation was made in respect to them.

The court instructed the jury, in effect, that if the plaintiff's evidence was true, the title to the property was in him, and that he was entitled to recover, to which the defendant excepted. The court was also asked to dismiss the complaint, upon the ground that the plaintiff had failed to establish title, which was refused, and an exception taken.

In this we think the court erred. If the plaintiff had the title to this property, it might have been taken in execution for his debts, or he could have sold it to a purchaser in good faith and for value, to the exclusion of the tenant and all claiming under him. Such consequences do not flow from the contract testified to by the plaintiff. He did not testify that title to the hay and grain was reserved by him, but

that the tenant agreed to feed enough of it on the farm to support the stock. This did not amount to a reservation of title, but was an executory contract, for a violation of which the landlord could have recovered damages.

The question involved in this case has been several times considered by the supreme court of this state. In *Johnson v. Crofoot*, 53 Barb. 574, 37 How. Pr. 59, a farm was let by a written lease for an annual money-rent. The lease contained a stipulation that the tenant "should feed out the hay and straw in a careful and farmer-like manner," and it was further agreed that if sufficient hay and straw was not raised to keep the stock, the landlord was to supply the deficiency. It was also provided: "The parties of the first part (landlords) are to have full title, with the privilege of taking possession at any and all times, of any and all products of the farm in payment of the balance due on the rent." A judgment was recovered against the tenant during the existence of the lease, and an execution issued to the defendant, who levied upon and sold about sixty tons of hay raised on the farm by the tenant, and then being in his actual possession on the farm. The plaintiff brought trover, claiming that under the lease the title to the hay never passed to or vested in the tenant, but that it was to remain on the farm for the purpose of feeding the stock. Verdict was directed for the defendant at the circuit, which direction was sustained at general term, the court saying: "But it is argued by the counsel for the plaintiff that it (lease) was not a mortgage, and that the title to such hay as should grow on the place did not pass to Tift (the tenant), because he stipulated in the lease that he would cut and get in good order all the hay, and that he would feed out the hay and straw in a saving manner, and because it was further stipulated that he was to have the privilege of keeping a span of horses all the time, and a third horse during haying, which, it is claimed, is inconsistent with the idea that the title to the hay was to be in him." In answer to this contention the court said: "The covenant on the part of Tift was to save all the hay and straw and to carefully feed it to the stock, and to keep but two horses, except during haying-time, was only an agreement binding on him at law; and if he chose to keep more horses, or to sell and improvidently use the hay, it did not authorize Miller and Rumble, the lessors, to interfere with him, either by taking possession of it (for they were entitled to possession only as

security for the unpaid rent), or to restrain such use of it by injunction." In *McCombs v. Becker*, 3 Hun, 342, 5 Thomp. & C. 550, the defendant leased his farm and forty cows for a money-rent. It was stipulated that the tenant should take good care of the cows, and in case the hay raised on the farm should be insufficient to winter them, the landlord should supply the deficiency at the rate of three dollars per ton, and if there should be a surplus, the landlord should have it and pay the tenant three dollars per ton for it. A judgment was recovered against the tenant, and an execution issued, under which part of the hay was purchased by the plaintiff, and afterwards the defendant (the landlord) converted it to his own use. In an action brought for the conversion, it was held that the plaintiff was entitled to recover, the court saying: "True, the landlord was to have the surplus hay, and pay three dollars per ton for it, but this was an executory contract for its purchase, the breach of which would be compensated in damages. It follows that the hay was the tenant's, and subject to sale upon execution against him."

Hawkins v. Giles, 45 Hun, 318, arose over a lease of a farm and seven cows from April 1, 1883, to April 1, 1884, for \$175 rent. The lessee agreed "to feed out all the fodder on said farm that is raised on said farm, . . . and winter said stock, seven cows, through to grass in the spring of 1884 on hay." In December, 1883, an execution creditor of the lessee levied upon about twenty-five tons of hay grown upon the farm during that year, which was sold to the plaintiff in the action. The owner of the farm prevented him from taking the hay, claiming,—1. That the tenant left without fully paying the rent; 2. That the hay was required to keep the cows through to grass of 1884; 3. That he was entitled to the manure which would be made by the hay being fed on the farm. It was held that the title to the hay was in the tenant, and was subject to sale under the execution, and the judgment entered in favor of the plaintiff was affirmed.

Steffin v. Steffin, 4 Civ. Proc. Rep. 179, 17 Week. Dig. 418, arose over an agreement to cultivate a farm on shares, the occupant agreeing to deliver "one half of all the products of said farm to (the owner) Mary A. Lockwood." An execution was issued against the occupant, and levied upon grain grown on the farm. It was held that the title to the property was in the occupant, the owner having a lien.

In *Turner v. Batchelder*, 17 Me. 257, a farm, with tools,

four cows, and other stock, was leased for a term of years, the landlord to have "one half of all the corn and grain and potatoes that shall grow on the farm, and half of the calves and half of the lambs and half of the wool. There was a clause in the lease that the lessor was to furnish four cows, one horse, and other stock sufficient to eat up all the hay that should grow on said farm." The hay was levied upon and sold by a creditor of the lessee, who was held to have a leviable interest in it, and that the lessor had no title to it.

In *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53, a farm was worked upon shares. By one of the terms of the agreement, "one half of the hay cut on the farm is to be eat by the stock kept on the farm, and the other half of the hay is to be divided equally between the contracting parties." An execution creditor of the occupier seized and sold the hay. The owner of the land brought trover. It was held that the title to the hay before division was in the occupier, and that the plaintiff was not entitled to recover for the undivided hay sold under the execution.

In *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278, the principle decided in the three cases last cited was held to be the law in Massachusetts.

The case at bar was decided upon the authority of *Heald v. Builders' Mutual Fire Ins. Co.*, 111 Mass. 38, in which it was held that a clause in a lease similar in effect to the agreement testified to by the plaintiff amounted to a reservation of the title to the owner of the land. This case seems to be in conflict with the cases decided by the supreme court of this state; and believing the rule declared by our courts rests upon well-recognized principles, we must decline to follow the supreme court of Massachusetts, and overrule the judgments of our own courts.

The judgment should be reversed and new trial granted, cost to abide the event.

LANDLORD AND TENANT — LEASE — TITLE TO PRODUCTS OF LEASE, WHEN IN TENANT. — Under a lease of a farm for years, the rent payable in a portion of the crops, the title to the crops until delivery is in the tenant: *Chicago etc. Ry Co. v. Leonard*, 94 Ind. 319; 43 Am. Rep. 155. See also note to *Miles v. Miles*, 64 Am. Dec. 367-370; *Dufus v. Bangs*, 122 N. Y. 423.

HEATH v. HEWITT.

[127 NEW YORK, 166.]

WORD "HEIRS," IN DEED, CONSTRUED AS MEANING CHILDREN WHEN. —

Where, from the language of a deed and from the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs," meant children, it will be so construed, and effect thus given to the instrument, notwithstanding the general rule that a conveyance to the heirs of a person living is void for uncertainty. In this respect there is no distinction between grants and wills.

ACTION to recover one equal undivided eleventh part of certain lands described in the complaint. The plaintiff, who is a son of Warren Heath, and grandson of Benjamin Heath, asserted title by virtue of a deed made April 28, 1846, between Benjamin Heath and the heirs of Warren Heath, to be equally divided among them. The recitals of the deed necessary to an understanding of the questions decided in the case are stated in the opinion. Warren Heath had eight children, of whom the plaintiff was one, at the date of the deed, and three children were thereafter born to him. All these children were living at the time of the commencement of this action. After the death of Benjamin Heath and his widow, Warren Heath entered into possession of the land in question, under claim of title as life tenant under said deed, and so continued until January 22, 1868. On the day last named, Warren Heath and his wife, for a valuable consideration, quitclaimed all their right, title, and interest in and to said premises to Harvey Heath. On March 1, 1871, Harvey Heath and wife, by a warranty deed, conveyed said lands to Jefferson S. Hewitt, the defendant in this action, who subsequently went into possession under said deed, and so continued up to the time of the trial. Warren Heath died in 1886. The referee in the case found as a conclusion of law that the deed from Benjamin Heath to "the heirs at law of Warren Heath," who was living, was void for uncertainty as to who were the grantees, and directed judgment to be entered dismissing the complaint, with costs. The general term reversed this judgment, and granted a new trial. Other facts are stated in the opinion.

S. Edward Day and H. Greenfield, for the appellant.

W. E. Hughitt and W. W. Hare, for the respondent.

PARKER, J. Appellant's contention is, that inasmuch as Warren Heath was living, a grant to his heirs was void for uncertainty, as there were no persons in being who could take

under that description. It is essential to the validity of a grant that the parties be named in the deed, or so plainly designated as to distinguish them with certainty, and it is asserted that as there were no heirs of Warren Heath at the date of the deed, "because no one can be heir during the life of his ancestor" (Broom's Legal Maxims, sec. 383), the grantees were neither named nor designated. Our attention is called to the rule laid down in Cruise's Digest, tit. 29, c. 3, where it is said to be "a rule of the common law that no inheritance can vest nor any person be the actual complete heir of another till the ancestor is previously dead, — *nemo est hæres viventis*."

In *Hall v. Leonard*, 1 Pick. 27, a grant of land to the heirs of A B was held to be void, and in a discussion of the question the court said: "No case has been found to support a grant to a man's heirs, he being living at the time of the grant."

So in *Morris v. Stephens*, 46 Pa. St. 200, a conveyance by a grantor to "the heirs of his son Andrew," who was then living, was held to be void for uncertainty.

In *Huss v. Stephens*, 51 Pa. St. 282, the grantor of the deed under consideration was also the grantor in the instrument before the court in *Morris v. Stephens*, 46 Pa. St. 200.

In the *Morris* case the deed described the grantees as heirs of Andrew Lantz, Jr., and the consideration expressed was one dollar in money and "the natural love and affection which the grantor hath for said heirs"; while in the *Huss* case the grantees were described in the same manner, but the consideration expressed was one dollar and "the natural love and affection he hath for his grandchildren." The difference in the two cases being, that in the latter the word "grandchildren," in the consideration clause, appears in the place of the word "heirs," in the former.

In the first case the deed was held to be void for uncertainty. But the second was declared to constitute a valid grant, because the word "grandchildren" defined what he meant by the use of the word "heirs" in describing the grantees. It enabled the court to ascertain that the word "heirs" was not used in its technical sense, but that by it the grantor intended to describe the children of Andrew Lantz, Jr.

In *Rivard v. Gisenhof*, 35 Hun, 247, the court asserted the general rule that a grant "to the heirs" of a living person is void for uncertainty.

And in *Umfreville v. Keeler*, 1 Thomp. & C. 486, the court

recognizes the doctrine of the cases cited, but held that a deed to "E. U., wife of A. U., and her heirs, the children of said A. U.," was valid, and operated to pass title to the children, because it was manifestly the intention of the grantor to confine the interest conveyed to the children of the parties named, notwithstanding the use of the word "heirs."

The legal and well-understood meaning of the word "heir" is, the one upon whom is cast an estate of inheritance upon the death of the owner, and it follows that this person is uncertain until death occurs; for until that event it can never be known to whom the estate will fall. Hence the doctrine of the cases referred to, and which, so far as we have observed, stand unquestioned.

If, then, the word "heirs" in this instrument be held to have been employed in its technical sense, it would follow that the deed should be declared void for uncertainty.

The courts of this state do not appear to have been called upon in the case of a deed to determine whether, in the light of other facts appearing in the deed, and the circumstances surrounding its execution, the word "heirs" may not be construed as meaning children of such living person, if it appears that such was manifestly the intention of the grantor. But in the construction of wills the question has been considered.

In *Heard v. Horton*, 1 Denio, 165, 48 Am. Dec. 659, the testator, after making sundry bequests and devises, and among others, to his son J. B. H. devised the residue of his real estate, without words of perpetuity, to his son J. H., on condition that he should pay his debts; and added, that if J. H. should die without issue at his decease, the real estate should be equally divided amongst the heirs of his son J. B. H.; it was held that the words "heirs of J. B. H.," he having children living at the time of making the will, sufficiently designated these children as the executory devisees, though J. B. H. was himself then living, he being referred to in the will as a living person. Judge Beardsley, in delivering the opinion of the court, said: "Where the will recognizes the ancestor as living, and makes a devise to his heir *eo nomine*, this shows that the term was not used in the strictest sense, but as meaning the heir apparent of the ancestor named."

Now in this case, Warren Heath was living at the time of the making of the deed, which fact sufficiently appears in the deed, because the grantor reserved to him a life estate in

the lands sought to be conveyed, and he had children living, among whom was the plaintiff in this action.

In *Vannorsdall v. Van Deventer*, 51 Barb. 187, the devise was to the legal heirs of his (testator's) brother A., deceased, and to the legal heirs of his sister M., deceased, and to the heirs of his brother-in-law W. V. At testator's death, W. V. was still living. It was held that the word "heirs," in so far as it related to the heirs of his brother-in-law W. V. was used as synonymous with the word "children," for the will assumes that he was then living; that the children of W. V. were entitled to take, and that the estate became vested in them immediately upon the death of the testator.

These cases were cited with approval in *Cushman v. Horton*, 59 N. Y. 149, in which the rule is laid down that to the word "heirs" must be given the ordinary legal meaning, unless it appears the testator used the word in other than the primary legal sense, in which event courts should give effect to the intention of the testator.

If it be said that both in England and in this country the courts have more generally supported indefinite forms of transmission by will than by grant, because in the case of wills they are intended to go into effect at a future time and to provide for future and uncertain events, not only for individuals named, but also for described classes of donees to be ascertained by evidence at the death of the testator or afterwards, while in the case of the present conveyance the very nature of the act excludes the necessity of indefiniteness, it may be answered that this difference is not of moment in determining whether the particular rule of construction adopted in the cases cited is applicable here. The determination made was, that if from the whole will it was manifest that in using the word "heirs" the testator meant children, the court should so construe it, and thus give effect to the intention of the testator.

But the statute also requires the court to give effect to the intent of the grantor in making the conveyance before us, if it may be done consistently with the rules of law. It provides that, "in the construction of every instrument creating or conveying, or authorizing the creation or conveyance, of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law": 1 Rev. Stats. 699, Edmonds's ed., sec. 2.

As the intent of the parties is to govern in grants as well as wills, there seems to be no basis on which to found a distinction between them as to the interpretation to be given to the word "heirs," if in the one case as in the other it appears that it was not the intention of the grantor or testator to use it in its ordinary legal sense.

We are then to ascertain whether the grantor intended by the words "the heirs of Warren Heath" to designate and describe the children of Warren Heath as his grantees.

It has been determined in many cases that the word "heirs," notwithstanding its primary and well-understood meaning, is susceptible of more than one interpretation: *Heard v. Horton*, 1 Denio, 165; 43 Am. Dec. 659; *Vannorsdall v. Van Deventer*, 51 Barb. 137; *Cushman v. Horton*, 59 N. Y. 149. And in determining which must be here given, we may look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the instrument: *French v. Carhart*, 1 N. Y. 96; *Coleman v. Beach*, 97 N. Y. 545-558.

At the date of the instrument, Warren Heath had eight children, who were also the grandchildren of Benjamin Heath, the grantor. Warren Heath was not only living, but the deed distinctly recognizes that fact, in that,— 1. It recites that the "conveyance is made subject to a certain judgment rendered in favor of Jonas Rude of \$250, the amount of which judgment the said Warren hereby agrees to pay"; and 2. The instrument undertakes to reserve "the whole use and absolute control of the said premises . . . to my son Warren during his life."

These facts bring the question before us within the rule laid down in *Heard v. Horton* and other cases cited *supra*, that when a will recognizes the ancestor as living, and makes a devise to his heir in that name, it shows that the term was used as meaning the heir apparent of the ancestor named, or, as stated in the *Vannorsdall* case, that the word "heirs" was used as synonymous with the word "children."

That he intended to describe the children of his son Warren as his grantees is further supported by the fact that the grant is by its terms immediate, the grantor undertaking to reserve a life estate in the premises to himself and to others for their lives. The conveyance was not to Warren Heath for life, and after his death to his heirs, but it constituted a present grant to persons whom the grantor designated as the heirs of War-

ren Heath, with an attempted reservation for the benefit of Warren, and the only persons answering that description, in any sense in which the word is employed, whether technically or popularly, would be the children of Warren.

The order should be affirmed, and judgment absolute rendered against the appellant, with costs.

"HEIRS" AND "CHILDREN" — CONSTRUCTION OF, AS USED IN WILLS AND DEEDS. — The word "heirs" may be construed to mean "children," when it clearly appears from the other parts of the instrument that it is not used in its purely legal, technical sense: *Griswold v. Hicks*, 132 Ill. 494; 22 Am. St. Rep. 549, and note; *Vickers v. Leigh*, 104 N. C. 248; *Broliar v. Marguis*, 80 Iowa, 49. The distinction between the terms "children" and "heirs," as used in a will, is generally unimportant: *Lockwood's Appeal*, 55 Conn. 157. No explanation appearing from the context, the word "heirs," when used in a legal instrument to designate the persons to whom personalty devolves, means those persons who under the statute of distribution would, in the event of death or intestacy, be entitled to the property of him by whom they are designated as heirs: *Johnson v. Knights of Honor*, 53 Ark. 255.

WERNER v. TUCH.

[127 NEW YORK, 217.]

TENDER OF PART OF MORTGAGE DEBT NOT AVAILABLE UNLESS KEPT GOOD, WHEN. — Where a mortgagee covenants to release a portion of the mortgaged premises upon payment of a specified part of the sum secured by the mortgage, a tender of the amount specified is not available in a suit to foreclose the mortgage, unless the tender is kept good and the money paid into court. Where such tender is made for the purpose of basing upon it a demand for affirmative relief, the principle that he who seeks equity must do equity compels the mortgagor to keep the tender good, before it will allow him to maintain a suit to destroy the lien of the mortgage on account of a tender and refusal.

ACTION to foreclose a mortgage. The opinion states the case.

Frederick Collin, for the appellants.

A. J. Simpson, for the respondents.

VANN, J. The mortgage in question, dated April 9, 1881, was given to the plaintiffs by the defendants Tuch to secure the payment of the sum of \$5,260, being part of the purchase price of the premises therein described. The principal was payable May 1, 1891, and the interest semi-annually at the rate of five per cent per annum. There was an interest clause in the usual form, the period of grace being sixty days. The

premises embraced three adjoining parcels of land in the city of Elmira, known as the eastern, the central, and the western, and also a house and lot in the village of Blossburg, Pennsylvania. The mortgage provided that if the mortgagors should sell either of the parcels, the mortgagees would release to the purchaser the portion so sold free and discharged from the lien of the mortgage, upon receipt of the sum of \$2,500 for the release of the Blossburg parcel; \$1,750 for the eastern and \$850 each for the central and western parcels. It was further provided as follows: "The said sums when paid shall be credited on the gross amount due hereunder, and shall be in partial liquidation and exoneration hereof, but in no event shall the said mortgagees receive a greater sum than the said principal sum of \$5,260, with the interest and accretions hereunder. In case the mortgagors shall exercise their privilege, as next hereinafter granted, of paying off any part of the principal at any time other than upon a sale of the premises herein described, then the amount to be paid to secure the release of any of the parcels upon a sale shall abate proportionately. And it is hereby further understood and agreed that the mortgagors have the privilege of paying off any part of the principal sum during the term hereof (provided they shall not be otherwise in default), all payments of principal and interest to be evidenced by indorsements on the bond, and not otherwise." The mortgage was collateral to a bond, which, in addition to the usual stipulations, contained a provision that all the agreements mentioned in the mortgage "in reference to releasing portions of the premises upon a sale of any of the parcels of land therein described, and also in reference to any and all payments to be made on account of the principal or interest of this bond, or otherwise, shall be considered, and shall be a part of this bond or obligation as if incorporated therein."

June 11, 1883, the defendants Tuch paid to the plaintiffs the sum of \$850, and thereupon the westerly parcel was duly released from the lien of the mortgage. No other part of the principal has been paid, and the interest due May 1, 1887, is still unpaid. July 11, 1887, or more than sixty days after said default, this action was commenced to foreclose said mortgage, and a *lis pendens* in the usual form was filed, the plaintiffs having elected to call the whole amount due. The defendants Tuch served an answer, and in November, 1887, an amended answer, and in December following, Theresa L.

Hoppe, their daughter, purchased the central and easterly parcels, and received separate conveyances of the same, recorded, respectively, December 3, 1887, and February 18, 1888.

January 8, 1888, Mrs. Hoppe and the defendants Tuch tendered the plaintiffs the sum of \$2,600 of principal, and \$185 for interest and costs, and demanded the release of the central and easterly lots. Releases, proper in form, were at the same time presented, and a demand made that the plaintiffs execute the same as a condition of receiving the money. Notice was also given of the conveyances to Mrs. Hoppe. The plaintiffs refused to execute the releases, or to receive the money, upon the ground that they were entitled to the whole amount unpaid upon the mortgage. The money tendered was not subsequently kept good, nor paid into court, but the same was used, wholly or in part, by the person to whom it belonged, and by whom the tender was made in behalf of the defendants Tuch and Hoppe.

The cause was tried in February, 1888, and shortly before, a supplemental answer was served in behalf of Mr. and Mrs. Tuch, setting up said tender, and demanding "that by the judgment of the court, . . . the said two parcels of land for the release of which, or to procure the release of which, the said sums were and still are tendered the said mortgagees be released from the lien and effect of the said mortgage, and that any judgment of foreclosure which may be rendered herein be limited to the premises and parcels of land described in said mortgage other than those hereinbefore referred to and described, and to procure the release of which from the said mortgagees such tender of said amount and amounts was and were and is made."

The trial court held the tender insufficient, and rendered judgment for the plaintiffs. The general term affirmed, upon the grounds that as the mortgagors were in default, they were not in a situation to enforce a release; that the tender, being conditional, was insufficient, and being made the basis of an affirmative claim, should have been kept good.

Without here considering the other grounds, we base our affirmance of the judgment upon the one last named.

Assuming that the conditional tender, although not sufficient to discharge the mortgage debt, was sufficient to call into action the covenant to release, still we are of the opinion that, under the circumstances, the sum tendered should have been kept good, and brought or paid into court.

The general rule is, as laid down in the noted case of *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, that when the entire sum secured by a mortgage is due, a tender of the amount unpaid, at any time before a sale in foreclosure, extinguishes the lien, and that as it leaves the debt unaffected, it is not necessary to keep the tender good, or pay the money into court. We do not think, however, that the facts of this case bring it within the general rule. The tender in question was not made under the covenant of the mortgagors to pay the debt, but under the covenant of the mortgagees to release the land, because only the sum required to procure a release of part of the lands was tendered, not the amount required to pay the mortgage. The object was, not to discharge an obligation of the defendants, but to compel the performance of a promise by the plaintiffs. This was so stated, in substance, by the agent of the mortgagors when he made the tender, was well understood by all who were present, and is conceded by the learned counsel for the defendants in his points. This expressed purpose was followed by a supplemental answer, alleging the tender and demanding judgment for the release of the two parcels, "to procure the release of which the said sums were tendered." In other words, the tender was made for the purpose of basing a demand for affirmative relief upon it; and where that is the case, the rule as stated above does not apply, but a different rule, founded on the principle that he who seeks equity must himself do equity, is called into action, and compels the mortgagor to keep the tender good, before it will allow him to maintain an action to destroy the lien of the mortgage on account of a tender and refusal. As was said by this court in *Tuthill v. Morris*, 81 N. Y. 94, 99: "Although the authorities cited sustain the proposition that when a tender has been duly made of the full amount due, it will discharge the lien, and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of the opinion that it should be kept good, in order to entitle the mortgagor to the affirmative relief which he seeks in this action, and which the judgment awards him, viz., the extinguishment of the mortgage."

Where the mortgagors, although defendants, assume the position of plaintiffs, and demand in their answer that part of the mortgaged premises be released pursuant to an agreement of the mortgagees contained in the mortgage, no effect will be

given to the tender, unless the money is brought into court. It would be inequitable to extinguish the security in part, without giving to the holders of the mortgage the benefit of the proportionate payment for which they had contracted. A tender, in order to become the foundation of an action in equity, must be kept good or it will be wholly ineffectual: *Breunich v. Weselman*, 100 N. Y. 609, 610; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, 178; *Day v. Strong*, 29 Hun, 505.

The position of the defendants that they did not ask for affirmative relief has no foundation in the record. While they did not demand in their supplemental answer that the plaintiffs be compelled to execute a release, they did demand that a release be decreed by the court, as appears from the quotation already made. At the beginning of the trial their counsel announced "that the only defense in this case made by the defendants was under the supplemental answer, and that they withdrew their amended answer and waived all rights thereunder." That statement did not withdraw the counterclaim plainly set forth in the supplemental answer, nor relieve the defendants from the consequences of the position that they deliberately took when they asked for affirmative relief in the last of the three answers served by them, and the one upon which they stood when they went to trial.

The judgment should be affirmed, with costs.

TENDER — WHAT NECESSARY TO KEEP GOOD. — The tender of a mortgage debt must be kept good to release the lien of the mortgage: *Moore v. Norman*, 43 Min. 428; 19 Am. St. Rep. 247, and note. A tender of money made in the pleadings must be followed by a payment into court, to prove sufficient: *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792; *Warrington v. Pollard*, 24 Iowa, 281; 95 Am. Dec. 727, and note; *Oliver v. Fleming*, 81 Ga. 247; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165; *Sanders v. Peck*, 131 Ill. 408; *Alexander v. Oneida County*, 76 Wis. 56; *contra*, see *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435. A court of equity will not interfere to relieve a mortgagor, who, by his negligence, fails to perform his contract, whereby the whole debt becomes due and payable, unless he tenders or pays the whole debt: *Noyes v. Clark*, 7 Paige, 179; 32 Am. Dec. 621.

HOLMES AND GRIGGS MANUFACTURING COMPANY v. HOLMES AND WESSELL METAL COMPANY.

[127 NEW YORK, 232.]

CORPORATION MAY TAKE STOCK OF OTHER CORPORATIONS IN PAYMENT OF DEBT. — Although a corporation cannot purchase or deal in the stock of other corporations, unless it is expressly authorized by law so to do, it may take title to such stock in payment of a debt. And a statute prohibiting a corporation organized under it from using any of its funds in the purchase of any stock in any other corporation does not limit its power to take such stock in payment of a debt.

POWER OF PRIVATE CORPORATION TO SELL ITS PLANT AND RETIRE FROM BUSINESS. — A private manufacturing corporation has the right, with the consent of all its stockholders, to sell its plant to another corporation and retire from business, taking in payment the stock of such other corporation. And the fact that the stock so taken is issued to and held by a trustee for it does not render the transaction *ultra vires*.

ULTRA VIRES — PLEA OF, NOT PERMITTED TO PREVAIL WHERE IT WILL NOT ADVANCE JUSTICE. — A plea of *ultra vires* is not permitted to prevail where it will not advance justice, but will accomplish a legal wrong. Where, therefore, a corporation having, through an executed contract, acquired title to the stock of another corporation, sells it, the vendee cannot defeat an action to recover the price thereof on the plea that the transaction by which his vendor acquired title was *ultra vires*, even admitting that it was so.

ACTION on a promissory note. The opinion states the case.

Adam C. Ellis, for the appellants.

Sidney S. Harris, for the respondent.

HAIGHT, J. This action was brought to recover the amount of a promissory note bearing date December 1, 1884, executed by the defendant the Holmes and Wessell Metal Company, and indorsed by the defendants Morse and Shonnard. The defenses were *ultra vires*, no consideration, and a non-tender of certain stock, for the purchase price of which the note was given. The plaintiff is a manufacturing corporation, organized under the general act of 1848, for the purpose of manufacturing sheet and rolled-brass wire, tubing, and other articles composed wholly or in part of metal, in the city of New York. Its president was Charles E. L. Holmes, and its secretary and treasurer was George C. Edwards. On the twelfth day of July, 1881, Holmes and Edwards entered into an agreement with the defendants Shonnard, Morse, and one Charles Wessell to organize a new company for the manufacture of brass, nickeline alloys, and other composite metals, under the corporate name of the Holmes and Wessell Metal

Company, the capital stock of such company to be one hundred thousand dollars, the whole amount to be issued and paid up in cash; three-fourths thereof to be subscribed and paid by Holmes and Edwards, and the remaining one-fourth by the other parties to the agreement. The agreement, in its preamble, recites that Holmes and Edwards propose to transfer the rolling-mill belonging to the plaintiff, including all of the machinery, tools, and appliances connected therewith, together with the lease of the premises occupied by the plaintiff, for the sum of fifty thousand dollars. Subsequently, and at an annual meeting of the plaintiff's stockholders held on the twentieth day of July, 1881, the president and secretary were instructed to sell to the Holmes and Westell Metal Company the entire machinery and plant owned by the plaintiff for the sum of fifty thousand dollars; and also authorized them to sell to the same company all the material manufactured, unmanufactured, and in process of manufacture owned by the plaintiff, and to also subscribe for three thousand shares of the capital stock of the company, and to pay for the same out of the proceeds of the sale of the mill and materials.

It further appears that the Holmes and Westell Metal Company was incorporated on the fifteenth day of July, 1881, and that Charles E. L. Holmes subscribed for two thousand shares and George C. Edwards one thousand shares of the capital stock. Thereafter, and on the twenty-third day of July, 1881, the new company, at a meeting of its stockholders, authorized the purchase from the plaintiff of its plant and machinery, and to pay therefor the sum of \$50,000, and for the entire stock of materials manufactured and unmanufactured owned by the plaintiff the sum of \$31,333.96; and on the first day of September thereafter, such sale was completed by the transfer of the plaintiff company to the defendant company of its entire plant, machinery, etc., and in payment therefor the defendant company issued to George C. Edwards, trustee, the stock subscribed for by Holmes and Edwards, amounting to \$75,000, and the balance, \$6,833.96, was paid in cash. After such transfer the plaintiff discontinued its business.

On the first day of December, 1884, the plaintiff entered into a contract with the defendants Morse, Shonnard, and said Charles Westell, in which the plaintiff agreed to sell to the other parties thereto 1,440 shares of the stock of the defendant company, standing in the name of Edwards, as

trustee, for the sum of thirty thousand dollars, payable five thousand dollars in cash, and the balance by certain promissory notes, of which the note in suit is one. The agreement further provided that the stock should remain in the name of Edwards, or some other officer of the plaintiff, as trustee; that it might be voted upon by him until delivered as specifically provided in the contract.

It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations, unless expressly authorized by law so to do: *Talmage v. Pell*, 7 N. Y. 828; *Berry v. Yates*, 24 Barb. 200; *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 20; *Mechanics' Mut. Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 N. J. Eq. 475; *Hazlehurst v. Savannah etc. R. R. Co.*, 48 Ga. 57; *Valley R'y Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44; *People v. Chicago Gas Trust Co.*, 130 Ill. 268-284; 17 Am. St. Rep. 819; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; 28 Am. Rep. 9; *Hill v. Nisbet*, 100 Ind. 341-349.

It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given, and hence it may take title to all kinds of property, even the stock of another company, in the payment of a debt: *Talmage v. Pell*, 7 N. Y. 828, and cases above cited.

The statute under which the plaintiff was incorporated provides that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation": Laws 1848, c. 40, sec. 8. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated.

The plaintiff was a private manufacturing corporation. It exercises no powers of a public nature, and has attempted no combination by which the public may in any manner be prejudiced. There are consequently no questions affecting public policy to be considered. The purpose of the company is expressed in a preamble to the resolutions adopted authorizing the sale of its plant and stock of materials on hand to the defendant company. It was, in short, to increase the business of the stockholders, by adding to the manufacture of brass that of German silver and nickel alloys. The scheme adopted was the organization of a new corporation, bringing in some other persons with additional capital. The stock in

the new company was subscribed for by Holmes and Edwards individually, and the stock, when finally issued, was issued to Edwards. It is true, he takes it as trustee, and holds it as such for the plaintiff, but this we do not regard as necessarily *ultra vires*. The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made.

In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159-186, Folger, J., in delivering the opinion of the court, says that "a corporation may not do acts which affect the public to its harm, inasmuch as they are *per se* illegal, or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts."

In the case of *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393-405, 66 Am. Dec. 490, it was held that the directors of a manufacturing corporation may sell the whole property of the corporation to a new corporation, taking payment in shares of stock of the new company, to be distributed among the stockholders of the old company. In *Howe v. Boston Carpet Co.*, 16 Gray, 493, it was held that one manufacturing corporation may take the shares of another in payment of a debt. Chapman, J., in delivering the opinion of the court, in commenting upon the case *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490, says that "while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case. The legality of the transaction could not have depended on the intention of the corporation to wind up its affairs immediately. If it had taken the stock in the payment for goods, or for the sale of a building, or land, or water-power, which it did not want or desire to sell, while it still carried on its business, the act must have been equally legal."

In *Hodges v. New England Screw Co.*, 1 R. I. 812-847, 58 Am. Dec. 624, the facts were, in many respects, similar to

those under consideration. Greene, C. J., says: "Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company in payment for their rolling-mill, if it had been taken with a view to sell it again, and not permanently hold it. Again, it is to be observed the directors were not investing the funds of the screw company in the stock of the iron company. They had on hand an unsalable rolling-mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling-mill, and in part pay thereby the debt": *State v. Western Irrigating Canal Co.*, 40 Kan. 96; 10 Am. St. Rep. 166; *Leathers v. Janney*, 41 La. Ann. 1120; *Hibernia Ins. Co. v. St. Louis etc. Trans. Co.*, 8 Fed. Rep. 516; *Taylor v. North Star Gold Mining Co.*, 79 Cal. 285; *Miners' Ditch Co. v. Zellerbach*, 87 Cal. 543; 99 Am. Dec. 800; *State v. Butler*, 86 Tenn. 614; Morawetz on Private Corporations, sec. 212.

The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all of the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained: *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429-435.

But assuming the transaction to have been *ultra vires*, the defenses interposed would still be unavailable. The plaintiff has the stock and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same: *Sistare v. Best*, 88 N. Y. 526-543; *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 20.

The contract under which the note in suit was given was made in December, 1884, nearly four years after the plaintiff became the owner of the stock. No claim is made that that contract is for any reason illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such a contract. The courts will not permit the plea of *ultra vires* to prevail, whether interposed for or against a corpora-

tion, where it would not advance justice, but would accomplish a legal wrong: *Rider Life Raft Co. v. Roach*, 97 N. Y. 378-381; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504.

To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling-mill and material, thus accomplishing a wrong, and not advancing justice.

Our conclusions are, that it had title to the stock, and that consequently there was a valuable consideration for the note in suit.

The question raised in reference to the non-tender of the stock was properly disposed of by the general term.

The judgment should be affirmed, with costs.

CORPORATIONS — POWER OF ONE CORPORATION TO PURCHASE THE STOCK OF ANOTHER. — Corporations cannot purchase the stock of other corporations, unless expressly empowered to do so, but they may take the same in payment of a debt, or as security for a debt: *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319, and note; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590.

CORPORATIONS — POWER TO SELL OUT PLANT. — A corporation may contract to sell its property and surrender its stock, unless expressly prohibited from so doing: *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 380; 20 Am. St. Rep. 427, and note; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300, and extended note discussing this subject thoroughly. There is nothing to prevent a corporation from selling all of its property, if permitted to do so by its charter, and it is the wish of its stockholders: *Leathers v. Janney*, 41 La. Ann. 1120.

CORPORATIONS — CONTRACTS ULTRA VIRES — PLEA OF, WHEN UNAVAILABLE. — The plea of *ultra vires* should not prevail where it would defeat justice or accomplish a legal wrong: *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482, and note. Where a corporation has enjoyed the benefit of such a contract, it is estopped to set up the plea of *ultra vires*: *Sherman Center etc. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note; *Rollins v. Commissioners*, 15 Cal. 103; *Chesapeake Lime Works v. Dismukes*, 37 Ala. 344.

MILBANK v. JONES.

[127 NEW YORK, 370.]

GENERAL DENIAL IN ANSWER SIMPLY PUTS IN ISSUE ALL MATTERS WHICH PLAINTIFF IS BOUND TO PROVE. — In an action on a contract, a general denial in the answer puts in issue all matters which the plaintiff is bound to prove to make out his cause of action, and nothing more. If the defendant seeks to avail himself of facts not appearing upon the face of the contract, in order to establish its invalidity he must plead them.

EVIDENCE TO SHOW ILLEGALITY OF CONTRACT SURED ON INADMISSIBLE UNDER GENERAL DENIAL WHEN. — Where, in an action on a contract, the complaint sets forth and the plaintiff proves a contract valid on its face, the defendant cannot, under an answer which is simply a general denial, give evidence tending to show that the contract was against public policy, and therefore illegal.

ACTION to recover five thousand dollars and interest thereon, alleged to be held in trust for the defendant under the following agreement: —

“Resolved, that the street commissioner be and he is hereby authorized and directed to make a contract for lighting all the streets, avenues, roads, squares, parks, public buildings, and places of the city of New York with coal gas. Such contract to be founded on sealed bids and proposals, and to be made with the company, giving adequate security, to be approved by the comptroller, in the manner provided by law, which shall agree to do the same for the lowest price for each lamp or light per annum, or quantity when it can be measured, according to the existing regulations, and affording to such company sufficient time to lay their mains and introduce gas as required by the contract. The provisions of the contract last made and executed with the Manhattan Gas Company, as far as practicable, shall be embodied in the contract made in pursuance of this resolution, and the term during which the same is to continue will be for the same number of years as that contract. Any resolution or ordinance inconsistent with this resolution is hereby repealed.

“NEW YORK, June 14, 1866.

“Received of R. W. Milbank five thousand dollars (\$5,000), and also certificate for two hundred and fifty (250) shares of the stock of the People's Gas-Light Company of the city of New York, number seven (7), the said money and stock to be returned to said Milbank in case the resolution above shall not be passed and take effect before the 10th of July next. It being understood and agreed that said Milbank shall have

the right, at his election, in case said resolution shall pass and take effect before the said 10th of July, to purchase back the said stock at any time within sixty (60) days from the time said resolution shall take effect, by paying to me fifteen thousand dollars (\$15,000) therefor; and that he shall on his part be bound to purchase the same, and pay said fifteen thousand dollars (\$15,000) therefor, within said sixty (60) days, at my election.

MORGAN JONES."

"I assent to and join in the above understanding and agreement.

R. W. MILBANK.

"NEW YORK, June 14, 1866."

Other facts are stated in the opinion.

Ira Shafer, for the appellant.

Joseph Fettretch, for the respondent.

PARKER, J. On the trial the plaintiff, for the purpose of establishing a cause of action, introduced in evidence the agreement of the defendant to return the five thousand dollars paid to him in the event that the resolution therein referred to should not be passed and take effect before the 10th of July following, a record of the proceedings of the board of aldermen and board of councilmen, and a veto message by the mayor, showing that the resolution did not take effect before July 10th, together with proof that a demand for a return of the money was made prior to the commencement of the action, and rested. Thereupon the defendant made a motion to dismiss the complaint, assigning, among others, the following grounds: 1. A valid trust has not been established; 2. The contract is void, because on its face it appears that its purpose was to improperly influence legislation.

It appears from the agreement that Jones, at the time of its execution, received from Milbank five thousand dollars, which on the happening of a certain event he agreed to return. It did not provide that Jones should pay to Milbank five thousand dollars, but that "the said money (the receipt of which had been acknowledged) to be returned to said Milbank in case the resolution shall not be passed and take effect before the 10th of July next."

Clearly, such a transaction contains every element essential to the creation of a valid trust: *Day v. Roth*, 18 N. Y. 448-453.

It is the tendency of judicial decision to discountenance all attempts to influence the deliberations and determinations of

public bodies and officers, other than by arguments which, being openly made, bear directly upon the merits of a pending measure or application, because in contravention of a sound public policy. A contract founded on a violation of this wholesome rule of law is illegal, and the court will not lend its aid to a party seeking its enforcement, but will declare the contract void, leaving the parties to it in the position in which they placed themselves: *Mills v. Mills*, 40 N. Y. 546; 100 Am. Dec. 535.

The defendant, in his motion for a dismissal of the complaint, invoked this rule of law, but the situation then presented, as we think, did not support his position. It did not appear that Jones was an alderman, a councilman, or mayor. There was no evidence relating to the contract or the object sought to be accomplished by it outside of the instrument itself, and it does not appear from an examination of its provisions that it comes within the condemnation of the law because against public policy. It did not provide that Jones should assist in procuring the passage of the resolution therein referred to, or that he should render any services whatever. It purports to make Jones the depository merely of the money, to be by him returned in the event that the resolution should fail to pass and take effect before July 10th. The court therefore rightly denied the defendant's motion to dismiss the complaint, who at once entered on the introduction of testimony tending to show that the contract was against public policy. Plaintiff's counsel seasonably objected that it was immaterial, incompetent, and not admissible under the answer, because not pleaded. The objection was overruled, and the exception taken thereto presents the question assigned for error by the appellant. The answer was a general denial, and the plaintiff insisted on the trial, as he does on this appeal, that, not having been informed by the answer that the illegality of the contract would be an issue on the trial, he could not be expected to be prepared nor required to meet it. Under a general denial, the rule undoubtedly is, that if the illegality appears on the face of the complaint, or necessarily appears from plaintiff's evidence, advantage may be taken of it by defendant, who must also be permitted to controvert by evidence everything which the plaintiff is bound, in the first instance, to prove, in order to make out his cause of action. And the cases cited by the respondent in support of the ruling will be found on analysis to come within it.

In *Russell v. Burton*, 66 Barb. 539, the contract, as proved by the plaintiff, was for lobby services, and void.

In *Oscanyan v. Arms Co.*, 103 U. S. 261, the complaint was dismissed on the opening of plaintiff's counsel because it appeared therefrom that the contract relied on was illegal.

In *Cary v. Western U. Tel. Co.*, 20 Abb. N. C. 333, the plaintiff, in making proof of his contract, introduced evidence showing its invalidity.

And in *O'Brien v. McCann*, 58 N. Y. 376, *Clifford v. Dam*, 81 N. Y. 52, and *Griffin v. Long Island R. R. Co.*, 101 N. Y. 348, the court simply declared the rule, that under a general denial the defendant may give evidence tending to disprove any fact which the plaintiff is bound to prove in order to recover. But in this case it neither appeared from the complaint or the evidence presented by the plaintiff that the contract was illegal; and, as we have already shown, when the plaintiff rested the evidence established a cause of action. The general denial put in issue all matters which the plaintiff was bound to prove: nothing more. He was required to prove the contract entered into by defendant, which was on its face valid. Having accomplished that, he could not be compelled to enter into a controversy over matters, not appearing in the contract, involving the question of its validity or invalidity, because he had not been notified by the answer that the defendant proposed to assert his own participation in that which was a violation of law as a shield against the consequences of his agreement.

This rule has been enforced so long that it seems unnecessary to support it at this time by an extended reference to the decisions, and we shall therefore end the discussion by citing a few of the cases in which the courts of this state have said that a defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead it: *Dingeldoin v. Third Ave. R. R. Co.*, 37 N. Y. 575; *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480; *May v. Burras*, 13 Abb. N. C. 384; *Haywood v. Jones*, 10 Hun, 500; *Schroyer v. Mayor etc.*, 7 Jones & S. 1; *Vischer v. Bagg*, 21 Week. Dig. 399; *Honegger v. Wettstein*, 94 N. Y. 252.

The judgment should be reversed.

PLEADING — GENERAL DENIAL. — A general denial setting forth no new matter need not be replied to: *Drelling v. First Nat. Bank*, 43 Kan. 197; 19 Am. St. Rep. 126. A general denial admits proof of anything controverting directly the allegations of the complaint: *Johnson v. Oswald*, 38 Minn.

550; 8 Am. St. Rep. 698, and note. The illegality of a contract, to be available as a defense, must be pleaded: *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764, and note. An answer denying "generally each and every allegation" of the complaint is good as a general denial, and it is error for the court to refuse to allow the defendant to introduce evidence competent under such a plea: *Penter v. Staight*, 1 Wash. 365.

GREENE v. COUSE.

[127 NEW YORK, 364.]

TITLE TO LAND BY ADVERSE POSSESSION EFFECTUAL AS THAT CREATED IN ANY OTHER MANNER. — Title to land established by adverse possession is as effectual for the purposes of remedy or defense founded upon it as that created in any other manner.

VENDOR IN POSSESSION AS OWNER CLAIMING TITLE MAY DISPUTE HIS VENDOR'S TITLE. — The rule that where a vendee enters into possession of premises under a contract, he cannot, while he remains in possession, dispute the title of his vendor, does not apply in a case where, at the time of the contract to purchase, the vendee is in possession as owner claiming title, and his entry was not under his vendor.

PARTY IN POSSESSION HAVING TITLE MAY PURCHASE OUTSTANDING TITLE WITHOUT BEING ESTOPPED. — A person who is in possession of land as owner claiming title may, for the purpose of fortifying and quieting his title, purchase an outstanding title, without being estopped from disputing the title so purchased, in case it becomes necessary so to do.

EJECTMENT. The opinion states the case.

James R. Baumes, for the appellant.

W. and G. W. Youmans, for the respondent.

POTTER, J. The action is ejectment, and was brought to recover possession of an undivided one-twelfth part of the premises described in the complaint. The answer was a denial of the complaint, also title in the defendant, also title in the defendant arising from adverse possession of the premises for more than twenty years, and a counterclaim.

The premises as claimed in the complaint consist of 120 acres in the northwest corner of the east half of great lot No. 24, Evans patent, in Delaware County.

It was stipulated by the defendant, for the purpose of this appeal, that the plaintiff showed title in herself as one of the heirs at law of Martha Bradstreet, deceased, to an undivided one twelfth of the premises in question, except as such title may have been defeated by the adverse holding of the defendant herein and his predecessors, or parted with by force of the agreement of date March 5, 1875, hereinafter set forth.

The plaintiff proved and read in evidence an instrument, of which the following is a copy:—

“Received from A. Couse his note of four hundred dollars, for the purchase price, with cost of suits, of an undivided two-thirds interest in one hundred acres in the northwest corner of great lot 24, Evans patent, known as the wild lot, and being the same premises claimed to have been occupied by the said Couse for some years past; and I agree to forward to said Couse by mail, within ten days, a deed therefor.

“W. YOUMANS, Attorney for Bradstreet Heirs.

“Dated DELHI, N. Y., March 5, 1875.”

He proved that the land therein mentioned was that in dispute, also gave evidence that the note had not been paid, and the recovery of a judgment upon the note which had not been paid.

The defendant examined his grantor at considerable length to prove the defense of adverse possession of the premises, and that the defendant entered into the possession under a deed from his father, Alexander Couse, in 1882, who entered into the possession of the premises in 1849 under a deed from his father, Peter Couse, Sen., who, some years before, entered into possession under a written title from Joseph Nutter, and that such occupation had been continuous for over forty years, and that none of the occupants had entered into possession under plaintiff or any one from whom plaintiff derived title, and was proceeding with the examination of other witnesses upon that subject when the court ruled as follows: “The court: I think I must stop this evidence; you must make some other defense than the statute of limitations, or I must direct a verdict against you. The more I think of this question, the more I think the statute of limitations cannot prevail here.” Defendant’s counsel duly excepted to such ruling and decisions. “The court rules that under the contract of March 5, 1875, and the note of four hundred dollars given therefor, and the various stipulations and contracts in connection with that, that this defendant has lost his right to avail himself of the adverse possession of himself and of his predecessors, and declined to receive any further evidence of occupation and of adverse possession by the defendant and his predecessors.” To which ruling and decision the defendant’s counsel duly excepted.

After some additional evidence on the part of the plaintiff in relation to a subsequent arrangement as to the time and

condition of delivery of the deed and payment of the purchase price, the court directed a verdict for plaintiff, to which defendant excepted.

When the defendant was thus precluded from giving further evidence on the subject of adverse possession, that already given tended to prove title by adverse possession in the defendant's grantor at the time such instrument of March 5, 1875, was made, and thus there was presented a question of fact for the jury in that respect. And title so established may be as effectual as that created in any other manner for the purposes of remedy or defense founded upon it: *Barnes v. Light*, 116 N. Y. 84, and case there cited.

Upon this state of facts, the question is presented, whether the defendant should have been precluded or estopped from proving the defense of title to the premises by adverse possession.

The plaintiff and Alexander Couse, at the time such contract was made, respectively claimed to be the owner of the premises, and for the purposes of the question it may here be assumed that Alexander Couse and his grantor had been in the actual and continuous possession of the premises for forty or more years, and the plaintiff and those under whom she claimed had not, during that period, if ever, been in the actual possession, and that neither the said defendant nor any of his grantors had ever entered into or retained possession of the premises with any permission of or privity with the plaintiff, or her predecessors in title.

In the absence of any of these relations, the defendant and his grantors owed no duty or obligation to the plaintiff, and was therefore at liberty to fortify his title, or purchase peace at any price, and of whomsoever he chose.

If, however, the adverse possession of the defendant's grantor and those under whom he entered and claimed had not ripened into a title at the time the contract of March, 1875, was made, and excluding the time of the pendency of the action which was discontinued, the right to assert the continuance thereafter of such possession to perfect and support title as against the plaintiff would have been defeated by it.

I am aware of the rule that where a lessee or vendee enters into possession of premises under a lease or contract, he cannot, while he remains in possession, dispute the title of the lessor or vendor, but this case is lacking in the essential element which creates such estoppel. Neither the defendant nor

his grantors entered into the possession by any manner of consent or contractual relation with the plaintiff, or her ancestors or grantors. The rule in relation to estoppel does not apply "where, at the time of the purchase, the vendee is in as owner claiming title, and his entry was not under the vendor": *Glen v. Gibson*, 9 Barb. 634-640. "Where a man is in possession of land as owner having title, he is at liberty to purchase the land over again as often as claimants shall appear, who are not in possession, and thus quiet such claims and fortify his title, without being estopped from disputing the title of such subsequent vendors, should it afterwards become necessary for him to do so": *Jackson v. Leek*, 12 Wend. 105; *Bain v. Matteson*, 54 N. Y. 666.

Even in a consummated purchase, the grantee in fee may purchase in an outstanding title hostile to his grantor and fortify his own defective title: *Kenada v. Gardner*, 3 Barb. 589.

In *Watkins v. Holman*, 18 Pet. 54, it is said by the court, in discussing such relations, that "the relation of landlord and tenant in no sense exists between vendor and vendee."

Judge Bronson, in delivering the opinion of the court in *Osterhout v. Shoemaker*, 3 Hill, 513-518, says: "The grantee takes the land to hold for himself and to dispose of it at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title."

These views lead to the conclusion that the exceptions above mentioned were well taken, and require a new trial.

Judgment should be reversed and a new trial granted, with costs to abide the event.

HAIGHT, J., delivered a dissenting opinion, of which the following is a synopsis: The question presented for review is, whether or not the defendant can avail himself of the defense of adverse possession. It is not questioned that one holding adversely, and defending upon that ground, may purchase of a third person an outstanding title to support his own, whether he doubts the validity of his previous title or not, and that such purchase will not affect his right to defend under his claim of adverse possession; but a very different question is presented by the facts under consideration. By the settlement and agreement of March 5, 1875, the defendant in the action thereby settled not only admitted and recognized the plaintiff's title and right to recover, but also waived his right or claim of adverse possession, and his subsequent possession must be deemed to be under the contract to purchase. By that agreement the plaintiff was induced to discontinue her action, and thus forego the establishing of her title by judicial decree.

If the defendant is now permitted to avail himself of the defense of adverse possession, he may be permitted to establish a defense in consequence

of the agreement, and a breach thereof, which could not have been maintained had the settlement and agreement not been made. This should not be allowed under the well-settled principles of estoppel. The agreement debarred the plaintiff from maintaining an action to oust the defendant's grantor until he made a breach in his contract to purchase. The defendant gets no better title than his father had, and if the defense was not available to the father, it would not be to the son. It is not claimed that there was any fraud or deception in making the contract. When a person in possession of land covenants to pay another for it, he thereby acknowledges his vendor's title, and is estopped from setting up a title in himself, unless he can show that he was deceived or imposed upon in making the agreement: *Sedgwick and Wait on Trial of Title to Land*, sec. 317; *Jackson v. Ayers*, 14 Johna. 224; *Jackson v. Britton*, 4 Wend. 507; *Corning v. Troy Iron etc. Factory*, 34 Barb. 485; *Jackson v. Cuerden*, 2 Johna. Cas. 353; *Jackson v. Spear*, 7 Wend. 401; *Fosgate v. Herkimer M. & H. Co.*, 12 Barb. 352; *Tompkins v. Snow*, 63 Barb. 525; *Jackson v. Walker*, 7 Cow. 637; *Sayles v. Smith*, 12 Wend. 57; 27 Am. Dec. 117; *Ingraham v. Baldwin*, 9 N. Y. 45; *Smith v. Babcock*, 36 N. Y. 167; 93 Am. Dec. 498; *McMath v. Teel*, 64 Ga. 595; *Garlington v. Copeland*, 32 S. C. 57; 7 Am. & Eng. Ency. of Law, p. 32, tit. Estoppel.

The settlement and discontinuance of the suit furnished a good consideration for the agreement, which thenceforth became binding upon the parties. Their rights were fixed by it, and the party in default cannot now go back and litigate questions that were disposed of in the settlement.

The judgment in the action brought upon the note forever disposed of the facts that the contract of purchase was made, and that there was no breach thereof on the part of the plaintiff. The judgment, he thought, should be affirmed.

Parker, J., also dissented.

ADVERSE POSSESSION — WHAT TITLE IS CONFERRED. — The title acquired by adverse possession is as perfect for all purposes as though derived by deed from the original proprietor: *Nelson v. Brodhack*, 44 Mo. 506; 100 Am. Dec. 328; *Hodges v. Eddy*, 41 Vt. 485; 98 Am. Dec. 612.

RIGNEY v. RIGNEY.

[127 NEW YORK, 403.]

JURISDICTION OF COURT OF ANOTHER STATE TO DECREE COSTS AND ALIMONY MAY BE INQUIRED INTO WHEN. — The jurisdiction of a court of another state to render a judgment against a defendant for costs and alimony in an action for divorce may be inquired into by the courts of New York.

SUIT FOR DIVORCE IN, AS TO ALIMONY AND COSTS, PROCEEDING IN PERSONAM. — Although a suit for a divorce is in the nature of a proceeding *in rem*, or *quasi in rem*, in so far as it affects the marital status of the parties, as to alimony and costs it is a proceeding *in personam*.

DECREE FOR ALIMONY AND COSTS RENDERED UPON CONSTRUCTIVE SERVICE OF PROCESS NOT BINDING. — A provision in a decree of divorce awarding alimony and costs against a non-resident defendant, who was not served with process within the jurisdiction, and did not appear in the action, does not bind him, although the decree, so far as it affects the marital status of the plaintiff, is valid.

SERVICE OF NEW SUBPOENA NECESSARY UPON FILING SUPPLEMENTAL BILL.

— Where, in a suit for divorce, the plaintiff files a supplemental bill, alleging facts occurring after the filing of her original bill, which, if proved, would entitle her to the relief prayed for in her original bill, it is, under the law and practice of the court of chancery of New Jersey, an indispensable prerequisite to the rendition of a personal judgment against the defendant that a new subpoena be served upon him within the jurisdiction, after the filing of the supplemental bill, or that he appear in the action, notwithstanding he appeared and answered the original bill.

DEFENDANT NOT ESTOPPED FROM QUESTIONING JUDGMENT FOR ALIMONY

AND COSTS WHEN. — A defendant in a divorce suit, against whom a judgment for alimony and costs has been rendered upon constructive service of process, is not estopped by his subsequent marriage, and a motion on his part to modify the decree in one particular not affecting the alimony and costs, from questioning the right of the court to render the judgment for alimony and costs.

ACTION to enforce, as to alimony and costs, a decree of the court of chancery of New Jersey divorcing the parties. On the 23d of April, 1883, plaintiff filed a bill in said court, wherein she charged the defendant with adultery, and prayed for a divorce, the custody of the children of the marriage, and alimony and costs. On August 4, 1883, the defendant appeared in the suit and filed an answer, denying the allegations of adultery, but the issue thus joined was never brought to trial. On the 21st of April, 1886, the plaintiff verified a supplemental bill, wherein she alleged that the defendant had committed adultery at various times since the commencement of the suit, and prayed for the same relief asked in the original bill. On May 2, 1887, the court made an order directing that a certified copy of the order and supplemental bill be served on the defendant personally, or in default of such service, by publication, and requiring him to plead on or before May 18, 1887. This order recited that the defendant was then a resident of New York. On the 4th of May, 1887, the defendant was personally served with a certified copy of the supplemental bill and order at the city of New York. On the 18th of May, 1887, the supplemental bill was filed, and on the next day the default of the defendant was entered and the case referred to the master, who, on the 11th of June, 1887, reported that the defendant had committed adultery as alleged in the supplemental bill, and that all the material allegations of the bill and supplemental bill were true. On the 13th of June, 1887, a final decree was entered, decreeing a divorce, awarding the custody of the children to the mother, and giving her alimony and costs. On the 18th of Septem-

ber, 1887, the defendant remarried. On the 9th of September, 1887, the defendant's solicitors served upon the plaintiff's solicitor a notice of an application for an order striking from the final decree certain words. No modification was asked for as to alimony or costs, and the solicitors limited their appearance for the purpose of the motion only. This action was begun on August 4, 1887, and a judgment in favor of the defendant was entered upon a decision of the court on trial at special term. This judgment was reversed by the general term, and a new trial granted.

Hamilton Wallis, for the appellant.

J. A. Shoudy, for the respondent.

FOLLETT, C. J. The courts of this state are commanded by the constitution and statutes of the United States to give such faith and credit to the judgment of the court of chancery of New Jersey as the judgment has by law or usage in the courts of that state: U. S. Const., art. 4, sec. 1; U. S. Rev. Stats., sec. 905. The jurisdiction of the court of chancery to render the judgment against this defendant for costs and alimony may be inquired into by the courts of this state, and whether it had or not is the only question presented by the record.

A suit for a divorce, though not strictly a proceeding *in rem* (*Cole v. Cunningham*, 133 U. S. 107, 116; *Mankin v. Chandler*, 2 Brock. 127; 2 Bishop on Marriage and Divorce, secs. 20; Drake on Attachment, sec. 5), is of the nature of such a proceeding, or *quasi in rem*, in so far as it affects the marital status of the parties; but as to alimony and costs it is a proceeding *in personam*: *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; 2 Bishop on Marriage and Divorce, sec. 23; 2 Black on Judgments, secs. 925, 933. The courts of the United States and those of most of the several states, including New York and New Jersey, hold a divorce to be valid, so far as it affects the marital status of the plaintiff, which is granted by the courts of a state pursuant to its statutes to one of its resident citizens in an action brought by such citizen against a resident citizen of another state, though the defendant neither appears in the action nor is served with process in the state wherein the divorce is granted: *Cheever v. Wilson*, 9 Wall. 108; *Pennoyer v. Neff*, 95 U. S. 714; *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *Doughty v. Doughty*, 28 N. J. Eq. 581; Cooley's Constitutional Limitations, 400; 2 Bishop on Marriage and

Divorce, secs. 150 et seq. But the courts of this and some of the states hold that the marital status of such non-resident defendant is not changed by a judgment so recovered, he or she remaining a married person: *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *Cross v. Cross*, 108 N. Y. 628; *Cook v. Cook*, 56 Wis. 195; 43 Am. Rep. 706; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Flower v. Flower*, 42 N. J. Eq. 152; 2 Bishop on Marriage and Divorce, secs. 153 et seq.; 2 Black on Judgments, sec. 926. In case a defendant is a resident of the state in which the action is brought, and amenable to its substantive laws and its laws of procedure, his marital relation may be changed by an *ex parte* judgment of divorce, if constructive service of the process be duly made: *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Hood v. Hood*, 11 Allen, 196; 87 Am. Dec. 709; 2 Black on Judgments, sec. 926; 2 Bishop on Marriage and Divorce, sec. 25. It has been several times held, and the decisions rest upon principle, that a judgment which awards, — 1. A divorce; 2. Alimony; 3. Costs, — while valid as affecting the marital status of the plaintiff, does not bind the defendant as to sums allowed for alimony and costs in case the judgment be recovered in the state in which the wife is a resident citizen, against her non-resident husband, who has not appeared in the action, nor has been served with process in the state in which the action was brought: *Beard v. Beard*, 21 Ind. 321; *Lyle v. Lyle*, 48 Ind. 200; *Middleworth v. McDowell*, 49 Ind. 386; *Prosser v. Warner*, 47 Vt. 667; 19 Am. Rep. 132; *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Garner v. Garner*, 56 Md. 127; *Van Storch v. Griffin*, 71 Pa. St. 240; *People v. Baker*, 76 N. Y. 78, 87; 32 Am. Rep. 274; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; 2 Bishop on Marriage and Divorce, secs. 35, 36, 79; Cooley's Constitutional Limitations, 406; 2 Black on Judgments, sec. 933; Freeman on Judgments, secs. 584, 586; Brown on Jurisdiction, 556-558 et seq.

No final process is required to enforce that part of the judgment which decrees the divorce; but the sums allowed for costs and alimony can only be collected in New Jersey by a process against the defendant or his property; and, like other money judgments, it is not binding on a non-resident defendant, unless he is served with process in the state, or appears in the action. A judgment for a deficiency arising upon

the sale of mortgaged property is not binding on a non-resident defendant who has not been served with process nor appeared in the action: *Schwinger v. Hickok*, 53 N. Y. 280; and such is the rule in respect to personal judgments rendered against non-resident defendants in actions begun by substituted service in which property is attached: *Oakley v. Aspinwall*, 4 N. Y. 514; *Durant v. Abendroth*, 97 N. Y. 132; *Cooper v. Reynolds*, 10 Wall. 308; Drake on Attachment, sec. 5. A judgment for alimony and costs cannot be supported on the ground that they are mere incidents of and subordinate to the right to a divorce, and the jurisdiction which is sufficient to support a decree changing the marital status of the plaintiff will not necessarily sustain a judgment for alimony and costs. This brings us to the question whether the defendant's appearance in the court of chancery, in obedience to the subpoena issued upon filing the original bill of complaint, gave that court jurisdiction to render a personal judgment against him on the supplemental bill which alleged the commission of a matrimonial offense subsequent to the issue joined on the original bill. This question must be determined by the law of New Jersey, for no greater effect can be given the judgment in this state than would be given to it in the state where rendered: U. S. Rev. Stats., sec. 905; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Sydam v. Barber*, 18 N. Y. 468; 75 Am. Dec. 254. Each state has power to regulate the procedure of its courts, and prescribe the rights which plaintiffs may acquire by judgments recovered in its tribunals. The practice and procedure may be established by statute or by the rules and decisions of the courts, and the courts of a sister state cannot give greater effect to the procedure adopted than is given to it by the courts of the state in which the judgment was recovered: *Hampton v. McConnel*, 3 Wheat. 234; *Thompson v. Whitman*, 18 Wall. 457; *Mackay v. Gordon*, 84 N. J. L. 286.

At the date of the filing of the supplemental bill the defendant had ceased to be a resident of the state of New Jersey, as was found by the trial court, and had become a resident of the state of New York, as was alleged in a petition filed by the plaintiff. The trial court found, upon undisputed evidence, that under the law of New Jersey and the practice of its court of chancery, jurisdiction to render a judgment for alimony and costs on the supplemental bill, enforceable in that state against the defendant, could not be acquired

without service of a new subpoena in the state, or by his appearance in the action subsequent to the filing of the supplemental bill. The practice of the plaintiff's solicitor, and sanctioned by the court of chancery, was strictly in accordance with this finding. The defendant's solicitors resided in the state of New Jersey, but no notice was given them of the application to file the supplemental bill, or any of the proceedings taken after it was filed. The plaintiff's solicitor procured a new subpoena to be issued, and obtained an order for its service by publication, or personally without the state. It does not appear that the solicitors for the defendant were served with the subpoena or with a copy of the supplemental bill, or had notice that one had been filed. If the defendant was deemed to be in court for the purposes of the supplemental bill, and the proceedings thereunder by virtue of his appearance and answering the original bill, his solicitors would have been entitled to notice of the proceedings subsequent to the filing of the supplemental bill, and the entry of a *pro confesso* judgment would not have been authorized.

It is urged that the omission to serve the defendant with a subpoena within the state after the supplemental bill was filed was a mere irregularity, and not jurisdictional. The difficulty with this position is that it was not so found. On the contrary, service within the state was found to be, under the law and practice of the court of chancery of New Jersey, an indispensable prerequisite to the rendition of a personal judgment. An act or omission which would be held only an irregularity under the laws of one state may by the laws of another be fatal to the right of the court to proceed to judgment.

By the rules and decisions of the English court of chancery, which have been generally adopted and followed by the equity courts of the United States and of the several states, facts occurring after the filing of an original bill, which, if proved, would entitle the complainant to the relief prayed for in the original bill, cannot be introduced therein by amendment, but may be brought before the court, if at all, by a supplemental bill: Story's Eq. Pl., sec. 832; and when a supplemental bill is filed, the defendant must be brought into court by the service of a new subpoena within the state, unless he voluntarily appears after the supplemental bill is filed: *Barber v. Beers*, 8 Stew. N. J. Dig. 252, 400; *Lawrence v. Bolton*, 8 Paige, 294.

It is urged that the defendant, by his subsequent marriage and motion to correct the judgment, recognized its validity in all its parts, and is estopped from questioning the right of the court of chancery to render a judgment for alimony and costs. We fail to discover on what principle these facts can be held to create an estoppel by conduct, as the plaintiff neither did nor omitted to do anything by reason of these acts.

This action being for the recovery of "a sum of money only," the court has no discretion as to costs: Code Civ. Proc., sec. 3228.

The order should be reversed, and the judgment of special term affirmed, with costs.

MARRIAGE AND DIVORCE — JURISDICTION OF COURTS TO ENTER DIVORCES AGAINST NON-RESIDENT DEFENDANTS. — A court has no extraterritorial jurisdiction, and a person not domiciled in a state cannot be charged in personam by adjudication there, unless he voluntarily submits himself to its jurisdiction: *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652, and note. The marriage relation is not *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another state: *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447, and note. While such appears to be the law in New York, there is no doubt that it is not the law in the other states; and that the courts of any state are competent to entertain a suit for divorce by any *bona fide* resident thereof, against his or her non-resident spouse, and to enter judgment binding on such resident, whether based on constructive service of process or not: *Freeman on Judgments*, secs. 581-586; *Cheely v. Clayton*, 110 U. S. 705; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 246; *Jones v. Jones*, 67 Miss. 195; 19 Am. St. Rep. 299; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35.

SWEENEY v. WARREN.

[127 NEW YORK, 426.]

POWER GIVEN EXECUTOR TO CONVERT REALTY INTO MONEY FOR SPECIFIC PURPOSE EXTINGUISHED WHEN SUCH PURPOSE IS ACCOMPLISHED WITHOUT CONVERSION. — When a testator authorizes his executor to sell and convert into money all or a part of his realty for a specific purpose, which fails, or is accomplished without a conversion, the power is extinguished, and the land cannot be sold by virtue of it, or treated as money, but it descends to the heir, unless it is devised.

PERSONAL ESTATE OF TESTATOR NOT DISCHARGED FROM PAYMENTS OF HIS DEBTS WITHOUT CLEAR PROOF THAT HE INTENDED IT TO BE SO. — The personal estate of a testator will not be discharged from the burden of paying his debts, unless it clearly appears that he intended that it should be; and this will not be inferred from the fact that authority is given to sell all or some part of his real estate for the payment of his debts, especially where no disposition is made of the personalty.

OBJECTS OF POWER MUST BE SPECIFIED OR ASCERTAINABLE FROM INSTRUMENT ATTEMPTING TO CREATE IT. — To create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created.

POWER CONFERRED UPON EXECUTOR PRESUMED TO BE GIVEN TO BE EXECUTED IN INTEREST OF ESTATE. — When a power is given to an executor by virtue of his office, and not to him as an individual, there being no other evidence that it was intended to be beneficial to him, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for his own benefit.

HEIRS NOT ESTOPPED FROM SUING TO RECOVER LAND SOLD BY EXECUTOR WHEN. — Where an executor sells lands of his testator, under a supposed power in the will, to the testator's widow, both parties knowing at the time that the testator's personal property was more than sufficient to pay all debts and the expenses of administration, the widow not paying the purchase price, but simply receipting for it as so much personalty, and upon the final settlement of the executor's accounts all the heirs are cited to appear, and said accounts are settled, the proceeds of said sale being treated and disposed of as personalty, such heirs are not estopped from maintaining an action against said widow for the recovery of the land so conveyed to her.

EJECTMENT by the heirs at law against the widow of John Sweeney, deceased. Pending the suit, Mrs. Sweeney died, and her executors were substituted in her stead. The provisions of the will of John Sweeney under which the land in question was sold to the widow, and other facts necessary to an understanding of the questions decided, are stated in the opinions. The judgment of the general term was in favor of the defendants.

Sherman S. Rogers, for the appellants.

E. C. Sprague, for the respondents.

FOLLETT, C. J. In considering the questions involved in this appeal, it will be convenient to examine separately the two clauses which, it is asserted, gave the executor power to sell the lot sought to be recovered. The clause contained in the latter part of the will provides: "I authorize and direct my executors to sell and convey the strip of land heretofore mentioned and described as lying on the Niagara River, and also that piece of land on Sweeney Street and on the Tonawanda Creek, east of the building known as the shoe-shop, for the purpose of discharging all my debts." By this provision, the lots mentioned are not converted into money out and out, but the executors are empowered to convert them for a specific purpose, to wit, the payment of the testator's debts.

When a testator authorizes his executors to sell and convert into money all or a part of his realty for a specific purpose, which fails, or is accomplished without a conversion, the power is extinguished, and the land cannot be sold by virtue of it or treated as money, but it descends to the heir, unless it is devised: *Wood v. Keyes*, 8 Paige, 365; *McCarty v. Terry*, 7 Lans. 236; *Jackson v. Jansen*, 6 Johns. 73; *Sharpsteen v. Tillou*, 3 Cow. 651; *Bogert v. Hertell*, 4 Hill, 492; *Hetsel v. Barber*, 69 N. Y. 1; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748; *Hill v. Cook*, 1 Ves. & B. 175; *Chitty v. Parker*, 2 Ves. 271; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; Leigh and Dalzell on Conversion, 93; Lewin on Trusts, 8th ed., 149, 953. When the executor sold the lot, both he and the purchaser knew that the testator's personal property exceeded by more than twelve hundred dollars the testator's debts and the expenses of administration, which defeated the power to sell under this clause, unless, as it is argued, the testator intended that these lots should be sold, and the avails applied towards the payment of his debts, for the purpose of relieving to that extent the personal estate from the burden imposed by the rule of the common law, that it is primarily liable for the payment of debts, and must be first exhausted, unless there is a clear direction that the real estate, or some part of it, shall be first so applied. This question was considered in *Heermans v. Robertson*, 64 N. Y. 332, where it is said: "The order of marshaling assets for the payment of debts is to apply, — 1. The general personal estate; 2. Estates specially devised for the payment of debts; 3. Estates descended; 4. Estates devised, though generally charged with the payment of debts: 2 Williams on Executors, 1526, note 2; *Livingston v. Newkirk*, 3 Johns. Ch. 312; 4 Kent's Com. 420. In order to effect a change in the order, there must be some absolute and positive direction, clearly indicating an intent to relieve the class of assets primarily liable, and to charge some other portion of the estate in exoneration of the funds and property primarily liable. A mere direction to an executor to sell real estate does not make the proceeds necessarily liable as personal assets, but they will be only applicable to the payment of debts when the assets personal in their character shall have been exhausted": Page 344. Before the personal estate of a testator will be discharged from the burden of paying the debts, it must clearly appear that he intended that it should be, which will not be inferred from the fact that

authority is given to sell all or some part of the real estate for the payment of debts, and especially in a case where, as in this, no disposition is made of the personalty: *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540; *Hancox v. Abbey*, 11 Ves. 179. Under this clause, the executor had no power to sell the lot in question.

It remains to be considered whether the sale can be sustained under the power contained in the earlier part of the will, which provides: "I also desire and authorize my executors to sell and convey all that part of block F on the Niagara River, running back from said river to a continuation of the west line (to the north) of a projected canal, as laid down on a map made by Augustus Canfield, on lot or block G, being nearly on a parallel line with the said Niagara River, and it is my desire that the said land shall be sold in a body, for commercial purposes."

Powers, as they existed prior to January 1, 1830, were abolished by article 8 (Of Powers) of title 2 of chapter 1 of the second part of the Revised Statutes, sec. 78, which article was intended to be a codification of the law under which powers were thereafter to be created, governed, and construed: *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 295, 305. As to beneficial powers, it is enacted by section 92 that none except those enumerated in the article shall be valid.

"A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon which the owner, granting or reserving such power, might himself lawfully perform": Sec. 74. All powers are divided into two general classes, beneficial powers and powers in trust. "A power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution": Sec. 79. "A power is in trust when any person or class of persons other than the grantee of such power is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the land according to the power": Sec. 94. These powers are subdivided into general and special powers. "A power is general when it authorizes the alienation in fee of the lands embraced in the power to any alienee whatever": Sec. 78. Special powers are defined in section 78, but it is unnecessary to call attention to the definition, as it is agreed by counsel and is clear that the power claimed to be created is a general one.

To create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created: *Jennings v. Conboy*, 73 N. Y. 230; 1 Sugden on Powers, 8d Am. ed., 117, 173; Farwell on Powers, 29, 401; Abbott's Law Dict., tit. Objects of a Power; 4 Cruise on Real Property, c. 19, sec. 32; Green's ed., vol. 2, p. 294, sec. 32. For the creation of a valid power in trust, it is essential that its execution be beneficial to some person or class of persons other than the grantee of the power who can compel the due execution of the trust, which person or class of persons must be designated in or be clearly ascertainable from the instrument by which the power is created: 1 Rev. Stats., p. 734, sec. 94; *Read v. Williams*, 125 N. Y. 560; 21 Am. St. Rep. 748. As this will disclose no purpose to be accomplished, nor any person or class of persons to be benefited by the alienation of the land under the clause last quoted, a valid power in trust was not created by it.

Does the clause create a beneficial power? When a power is conferred upon an individual (not upon a trustee), and no person other than the grantee of the power has an interest in its execution, it is beneficial; and so a power is beneficial when it is silent as to the person to be benefited by its execution: *Jennings v. Conboy*, 73 N. Y. 230. Undoubtedly a power may be vested in executors, as such, to be exercised for their own benefit as individuals, which would be a beneficial one; but when a power is conferred upon executors by virtue of their office, and not on them as individuals, there being no other evidence that it was intended to be beneficial to them, the presumption is, that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit. In this case the power sought to be conferred by this clause runs to the executors in their representative capacity, and not to them as individuals, and it is clear that the testator did not intend to confer a power on his executors for their personal benefit, but for the purpose of administering his estate, which purpose has failed, as before shown. No such beneficial power as is claimed to exist under this clause is authorized or enumerated in the article relating to powers, and consequently the clause in question does not create a valid beneficial power: 1 Rev. Stats., p. 733, sec. 92. No valid beneficial power or valid power in trust being created by this

clause, and the purpose for which the power was given in the clause first considered having failed before the land was conveyed, no title was acquired under the conveyance executed by the executors.

After paying the debts and expenses of administration, there was in the executor's hands, arising from the personal estate, a surplus of \$1,292.92, and \$180 received from George H. Bryant for the lot sold to him, which sums, amounting to \$1,472.92, were, May 25, 1857, paid over to the widow, who at that time receipted therefor, and also for the \$500 due from her on the purchase of the lot in question, which three sums amounted to \$1,972.92. In September, 1857, the executor applied to the surrogate's court for a final settlement of his accounts, and a citation was duly issued and personally served on all the heirs, next of kin, and persons interested in the estate, including these plaintiffs, to attend such final settlement. On the 14th of September, 1857, the account as presented was settled, the two sums amounting to \$680, arising from the sale of real estate, was treated as personalty, and the payment of May 25, 1857, to the widow was ratified and confirmed, upon the theory that the testator not having bequeathed his personalty, and not having left descendants, his widow was entitled to the residue of the personalty, unless it exceeded two thousand dollars. Whether any of the persons interested in the estate were present, or were represented on the accounting, does not appear.

It is now insisted, in behalf of the defendants, that the heirs are estopped by the proceedings in the surrogate's court from maintaining this action for the recovery of the land.

A surrogate's court has no jurisdiction over realty left by a decedent, or its avails, unless brought within it by a will, or by a statute for the purpose of being dealt with for some special purpose,—like the payment of debts, in case the personalty is inadequate for that purpose,—and therefore there is no judicial estoppel by a court having jurisdiction. None of the elements of an equitable estoppel or of an estoppel in pais have been pointed out by the learned counsel for the respondent, nor have we discovered any. The sale was not induced by the conduct of any of the heirs. The widow, who purchased the lot, never changed her position, nor have her executors, the defendants, changed theirs by reason of any act done or omitted by the heirs. She paid nothing and

parted with nothing in exchange for the deed which she took. It is true, she agreed to pay five hundred dollars; but she did not, that sum being charged as paid to her by the executor in his final account. There is nothing in the record showing any expenditure or change made or steps taken in respect to the property since the final accounting. The defendants are not purchasers of the lot for value, nor are they the representatives of one who purchased for value, relying upon the proceedings of the surrogate's court, and the acquiescence of the heirs.

The judgment should be reversed and a new trial granted, with costs to abide the event.

VAN, J., delivered a dissenting opinion, of which the following is a synopsis: John Sweeney's will was made, in anticipation of his death, three days before he died. He could not, therefore, have expected that any change in his estate would take place before his death, and there was no proof of any. He was a man of good business ability, conversant with business affairs, and therefore presumed to know that his personal property was more than sufficient to pay his debts. He is presumed to have known that his personal property would be first used to pay his debts, unless he directed otherwise. His will should be interpreted in the light of these presumptions, and his intention, when thus ascertained, carried into effect, due regard being paid to the rule that if the will is capable of two constructions, one leading to a legal and the other to an illegal result, the former is to be preferred: *Crosier v. Bray* 120 N. Y. 366; *Du Bois v. Ray*, 85 N. Y. 162.

The paragraphs of the will requiring construction are: "I also desire and authorize my executors to sell and convey" the premises in question; "and it is my desire that the said land shall be sold in a body for commercial purposes." And "I authorize and direct my executors to sell and convey" said premises, with another piece of land, "for the purpose of discharging all my debts." His desire that the land should be sold for commercial purposes is not inconsistent with his direction that it be sold to pay debts, for both desire and direction could be satisfied by the same act, and probably a higher price be thereby realized. It will be observed that he directed his executors to sell the real estate for the purpose of paying all his debts. The use of the word "all" indicates that no part of his personal property should be used to pay debts, provided the proceeds of this real estate were sufficient for that purpose. Adequate force can be given to that word in no other way. "All," as here used, means the whole, and not the remainder after application of the personal property. He directed a certain act to be done, and specifically stated the purpose of that act, and the act and purpose necessarily involved the exoneration of the personal property from the payment of debts, either absolutely or *pro tanto*. This was the natural and necessary result of the act directed with the purpose indicated. He did not need to state that he gave that direction with that purpose, for the purpose of relieving his personal property, because if all his debts were paid, his personal property would necessarily be relieved, and the last purpose was, therefore, included in the first. This construe-

tion prevents partial intestacy (*Vernon v. Vernon*, 53 N. Y. 351), prefers the widow to collateral heirs, gives effect to a clause which otherwise would be inoperative, and is in harmony with the practical construction of the heirs themselves, who not only acquiesced in the settlement of the executor's accounts based upon the sale as made under the will, but even waited nearly twenty years after the testator's death before they brought this action, claiming to have inherited the land from him. It is no longer necessary to use express words in order to exempt personal property from the payment of debts, but it is sufficient if there appears from the will an evident demonstration, a plain intention, or a necessary implication: *Hoes v. Van Hoesen*, 1 N. Y. 120. The direction to pay all the debts from a certain fund, by necessary implication, prohibits the payment of any debt from any other fund until the former is exhausted. The judgment appealed from should be affirmed."

ESTATES OF DECEDENTS—LIABILITY OF REALTY FOR DEBTS.—The personality of the testator is primarily chargeable with the payment of his debts and legacies, and it will not be discharged from this burden unless such is the intention of the testator, expressly declared, or fairly inferable from the language of his will: *Coch v. Coch*, 5 Houst. 540; 1 Am. St. Rep. 161, and note. Powers of sale to pay off the debts of the testator do not indicate any intention to charge the realty with the payment of such debts: *Olft v. Moses*, 116 N. Y. 144.

POWERS OF SALE.—When a power is given by the terms of a will to an executor to sell the real estate of the testator, such real estate descends to the heirs until their interests therein are divested by a valid exercise of the power: *Perkins v. Presnell*, 100 N. C. 220. Powers of sale given to particular persons under the terms of a will, which indicate that the testator has placed special confidence in the donees, can be exercised only by such donees: *Brocklin's Estate*, 74 Iowa, 412; *Drummond v. Jones*, 44 N. J. Eq. 53.

TODE v. GROSS.

[127 NEW YORK, 430.]

AGREEMENT TO DIVULGE SECRET PROCESS TO VENDEE, AND KEEP IT FROM ALL OTHERS, VALID.—A person carrying on a business founded on a secret process known only to himself and his agents may sell such business, including as an essential part thereof the secret process, and promise to divulge the secret to his vendee, and to keep it from every one else. Such an agreement is not in general restraint of trade, nor opposed to public policy, but is a reasonable measure of mutual protection to the parties, imposing no restraint upon either that is not beneficial to the other, and is therefore valid, especially when the restriction is limited as to time.

PARTY TO CONTRACT LIABLE FOR BREACH OF COVENANT COMMITTED BY HIS AGENTS WHEN.—Where a party to a contract covenants that neither he nor his agents will, for a limited time, do certain specified acts, the doing of such acts by said agents, or either of them, within such time, will constitute a breach of the covenant by the covenantor, although he himself does no personal act in violation of the covenant. While it is his exclusive covenant, it relates to the actions of others, and if they do

parted with nothing in exchange for the deed which she took. It is true, she agreed to pay five hundred dollars; but she did not, that sum being charged as paid to her by the executor in his final account. There is nothing in the record showing any expenditure or change made or steps taken in respect to the property since the final accounting. The defendants are not purchasers of the lot for value, nor are they the representatives of one who purchased for value, relying upon the proceedings of the surrogate's court, and the acquiescence of the heirs.

The judgment should be reversed and a new trial granted, with costs to abide the event.

VAN, J., delivered a dissenting opinion, of which the following is a synopsis: John Sweeney's will was made, in anticipation of his death, three days before he died. He could not, therefore, have expected that any change in his estate would take place before his death, and there was no proof of any. He was a man of good business ability, conversant with business affairs, and therefore presumed to know that his personal property was more than sufficient to pay his debts. He is presumed to have known that his personal property would be first used to pay his debts, unless he directed otherwise. His will should be interpreted in the light of these presumptions, and his intention, when thus ascertained, carried into effect, due regard being paid to the rule that if the will is capable of two constructions, one leading to a legal and the other to an illegal result, the former is to be preferred: *Crozier v. Bragg* 120 N. Y. 366; *Du Bois v. Ray*, 35 N. Y. 162.

The paragraphs of the will requiring construction are: "I also desire and authorize my executors to sell and convey" the premises in question; "and it is my desire that the said land shall be sold in a body for commercial purposes." And "I authorize and direct my executors to sell and convey" said premises, with another piece of land, "for the purpose of discharging all my debts." His desire that the land should be sold for commercial purposes is not inconsistent with his direction that it be sold to pay debts, for both desire and direction could be satisfied by the same act, and probably a higher price be thereby realized. It will be observed that he directed his executors to sell the real estate for the purpose of paying all his debts. The use of the word "all" indicates that no part of his personal property should be used to pay debts, provided the proceeds of this real estate were sufficient for that purpose. Adequate force can be given to that word in no other way. "All," as here used, means the whole, and not the remainder after application of the personal property. He directed a certain act to be done, and specifically stated the purpose of that act, and the act and purpose necessarily involved the exoneration of the personal property from the payment of debts, either absolutely or *pro tanto*. This was the natural and necessary result of the act directed with the purpose indicated. He did not need to state that he gave that direction with that purpose, for the purpose of relieving his personal property, because if all his debts were paid, his personal property would necessarily be relieved, and the last purpose was, therefore, included in the first. This construc-

tion prevents partial intestacy (*Vernon v. Vernon*, 53 N. Y. 351), prefers the widow to collateral heirs, gives effect to a clause which otherwise would be inoperative, and is in harmony with the practical construction of the heirs themselves, who not only acquiesced in the settlement of the executor's accounts based upon the sale as made under the will, but even waited nearly twenty years after the testator's death before they brought this action, claiming to have inherited the land from him. It is no longer necessary to use express words in order to exempt personal property from the payment of debts, but it is sufficient if there appears from the will an evident demonstration, a plain intention, or a necessary implication: *Hoes v. Van Hoes*, 1 N. Y. 120. The direction to pay all the debts from a certain fund, by necessary implication, prohibits the payment of any debt from any other fund until the former is exhausted. The judgment appealed from should be affirmed."

ESTATES OF DECEDENTS—LIABILITY OF REALTY FOR DEBTS.—The personality of the testator is primarily chargeable with the payment of his debts and legacies, and it will not be discharged from this burden unless such is the intention of the testator, expressly declared, or fairly inferable from the language of his will: *Cook v. Cook*, 5 Houst. 540; 1 Am. St. Rep. 161, and note. Powers of sale to pay off the debts of the testator do not indicate any intention to charge the realty with the payment of such debts: *Olft v. Moses*, 116 N. Y. 144.

POWERS OF SALE.—When a power is given by the terms of a will to an executor to sell the real estate of the testator, such real estate descends to the heirs until their interests therein are divested by a valid exercise of the power: *Perkins v. Presnell*, 100 N. C. 220. Powers of sale given to particular persons under the terms of a will, which indicate that the testator has placed special confidence in the donees, can be exercised only by such donees: *Brocklin's Estate*, 74 Iowa, 412; *Drummond v. Jones*, 44 N. J. Eq. 52.

TODE v. GROSS.

[127 NEW YORK, 430.]

AGREEMENT TO DIVULGE SECRET PROCESS TO VENDER, AND KEEP IT FROM ALL OTHERS, VALID.—A person carrying on a business founded on a secret process known only to himself and his agents may sell such business, including as an essential part thereof the secret process, and promise to divulge the secret to his vendee, and to keep it from every one else. Such an agreement is not in general restraint of trade, nor opposed to public policy, but is a reasonable measure of mutual protection to the parties, imposing no restraint upon either that is not beneficial to the other, and is therefore valid, especially when the restriction is limited as to time.

PARTY TO CONTRACT LIABLE FOR BREACH OF COVENANT COMMITTED BY HIS AGENTS WHEN.—Where a party to a contract covenants that neither he nor his agents will, for a limited time, do certain specified acts, the doing of such acts by said agents, or either of them, within such time, will constitute a breach of the covenant by the covenantor, although he himself does no personal act in violation of the covenant. While it is his exclusive covenant, it relates to the actions of others, and if they do

what he agreed that they would not do, it is a breach by him, although not his own act.

ACTUAL DAMAGES FOR BREACH OF COVENANT LIQUIDATED BY NAMING SPECIFIC SUM AS STIPULATED DAMAGES, WHEN.—Where the actual damages for the breach of a covenant will be necessarily wholly uncertain and incapable of being ascertained, except by conjecture, an intention to liquidate them is shown by the parties to the agreement by their providing that a sum named shall be as stipulated damages; and the use of the word "penalty" under such circumstances, is not controlling.

ACTION to recover stipulated damages for a breach of covenant. The defendant, prior to October 15, 1884, had been engaged with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, in the business of manufacturing cheeses at a factory owned by her in the town of Monroe. The cheeses, which were made by her by a secret process known only to herself and her said agents, were known as Fromage de Brie, Fromage d'Isigny, and Neufchatel. On the day last named she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the good-will, custom, trade-marks, and names used in and belonging to the said business. In this instrument she covenanted that, upon the payment of the consideration named therein, she would communicate, or cause to be communicated, to plaintiffs by her said agents the secret of the manufacture of the cheeses above named, and the recipe therefor, and instruct them, or cause them to be instructed, in the manufacture thereof; that she and her said agents would thereafter refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the plaintiffs; and that she and her said agents would thereafter refrain from engaging in the business of making or vending said cheeses, or either them, and from the use of the trade-marks or names, or either of them, agreed to be transferred in connection with said cheeses, or with any similar product, under the penalty of five thousand dollars, named as stipulated damages, to be paid by the defendant, or her heirs, executors, administrators, or assigns, in case of a violation by her of this covenant of this contract, or any part thereof, within five years from the date thereof. Both parties appear to have kept and performed the agreement, except that, as the trial court found, "subsequently to the first day of May, 1885, Conrad

Gross, the husband of defendant, went to New York City and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, etc.,' . . . and while so engaged . . . sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named Fromage d'Isigny, and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequently to the first day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York City boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by said Conrad Gross, under the name of Fromage d'Isigny, "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was reasonable, and founded upon a good and sufficient consideration; that said sale by Conrad Gross, and said keeping for sale by said August Gross, was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of five thousand dollars as stipulated damages, and this judgment was affirmed at the general term.

John Fennell, for the appellant.

Henry Bacon, for the respondents.

VANE, J. The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and, by keeping her secret, to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had and get what it was worth. Having the right to make

this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory: *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Hodge v. Sloan*, 107 N. Y. 244; 1 Am. St. Rep. 816; *Leslie v. Lorillard*, 110 N. Y. 519, 534; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is, that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret at all hazards the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy or the defendant sell for what her property was worth. Who had the power to keep the process secret? Clearly, the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant by assuming the risk of their actions, and unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and

whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself, for she undertakes that neither she nor they will disclose the secret or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her, for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others, and if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole, if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of of five thousand dollars, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act, and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her the same as if she had done the act in person.

The argument of the learned counsel for the defendant that

the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it, and she did not keep it.

As the actual damages for a breach of the covenant would necessarily be "wholly uncertain and incapable of being ascertained, except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty," under the circumstances, is not controlling: *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 718; *Dakin v. Williams*, 17 Wend. 448; affirming *Williams v. Dakin*, 22 Wend. 201; *Wooster v. Kisch*, 26 Hun, 61.

As there is no other question that requires discussion, the judgment should be affirmed, with costs.

CONTRACTS IN RESTRAINT OF TRADE. — For discussions of this subject, see notes to *Angier v. Webber*, 92 Am. Dec. 751-765; *Smalley v. Green*, 35 Am. Rep. 269-272; *Western Wooden-ware Ass'n v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686, and note. For the general rule as to the validity of contracts of sale accompanied with agreements on the part of the seller not to carry on the same business in the same territory, see *National B. Co. v. Union H. Co.*, 45 Minn. 273.

DAMAGES. — AS TO THE DISTINCTION between liquidated damages and penalties, see *Moore v. Colt*, 127 Pa. St. 289; 14 Am. St. Rep. 845, and note; *Carey v. Mackey*, 82 Me. 516; 17 Am. St. Rep. 500. For a discussion of what damages are liquidated, see *Williams v. Vance*, 9 S. C. 344; 30 Am. Rep. 26, and particularly note 28-36. It being in accord with the clear intention of the parties, a sum stipulated as damages for the breach of a contract will be sustained and allowed as liquidated damages: *Dakin v. Scott*, 70 Tex. 442; *Fauler v. Beard*, 39 Minn. 33; *Wibaux v. Grinnell etc. Co.*, 9 Mont. 154. Liquidated damages stipulated to be paid on the breach of a contract cannot be recovered, except upon a substantial breach: *Hathaway v. Lynn*, 75 Wis. 186.

McCracken v. Flanagan.

(127 NEW YORK, 482.)

AFFIDAVIT FOR ORDER OF PUBLICATION OF SUMMONS MUST SHOW "DUE DILIGENCE." — The simple averments in an affidavit for an order of publication of summons that the defendant is a non-resident of and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication, but such affidavit must show that due diligence to find the defendant has been exercised. Due diligence cannot be implied from the statement that the defendant cannot be found within the state.

EJECTMENT to recover possession of two lots of land. The answer alleged ownership in the defendants. Upon the trial the plaintiff relied upon a conveyance from one Henry Kahle, who, on the 12th of December, 1867, was the owner of the premises, to the plaintiff and one Patrick McCracken, by deed executed March 17, 1869. Patrick McCracken devised his interest in the same to the plaintiff. The defendants claimed title through a deed from the sheriff made to one Lawrence Cartan on the 25th of January, 1869, and by mesne conveyances from Cartan to one Edward Flanagan, and from the latter to the defendants. The sheriff's conveyance was made in pursuance of a sale of said premises under a judgment in favor of Lawrence Cartan against said Henry Kahle in the action in which the affidavit quoted in the opinion was made. Kahle did not appear in that action. Other facts appear in the opinion.

Eugene S. Ives, for the appellant.

James W. Covert and Thomas J. McKee, for the respondents.

POTTER, J. The affidavit upon which the judge granted the order for service of the summons and complaint upon the grantor of plaintiff was as follows:—

"City and County of New York, ss.

"Minott M. Silliman, being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action; that a summons has been issued in this action against the defendant therein; that defendant is a non-resident of this state, nor can be found therein, but has a place of residence at Matewan, in the state of New Jersey; that this action is brought to recover the sum of \$964.82, and the ground of the plaintiffs' claim in this action is a promissory note made by said defendant for \$727, and due December 13, 1866, and \$1.81 for protest of said note, and \$2.55 interest due thereon,

and the further sum of \$281.66, with \$1.30 interest due thereon, on a book-account for goods sold and delivered by said plaintiff to said defendant, which said several sums still remain due and unpaid; that said defendant has property consisting of real estate situated at Mount Vernon, in said county of Westchester and state of New York."

The affidavit is made by one of plaintiffs' attorneys, and though it embraces several quite diverse subjects, it nevertheless imports unqualified knowledge in respect to all of them.

The sole question sought to be raised upon this appeal by the appellant arises upon section 135 of the Code of Procedure, which is in these words: "Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state, and that fact appears to the satisfaction of the court, or a judge thereof, or of a county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: . . . Subd. 3. Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action," which precedes the specifications of the class of cases in which service of the summons other than personal may be made.

It would seem that, by a just construction of that section, certain facts are required to be made to appear to the satisfaction of the court or judge before granting the order for this exceptional mode of service of process upon the defendant in the action, viz., that such person cannot after due diligence be found within this state, and that a cause of action exists against such defendant in certain respects.

There is no question that the affidavit in this case makes it appear that a cause of action exists against the defendant, and the nature of it. But does the affidavit make these facts appear, viz., that the defendant cannot after due diligence be found within the state? This language fairly imports two facts, viz., the exercise of due diligence to find the defendant within this state, and the failure to find him through the exercise of such diligence.

Assuming that it was competent for the affiant to depose that the defendant could not be found within the state, will

such statement in the affidavit suffice for the proof of the exercise of due diligence to find the defendant? or is due diligence necessarily to be imported into the affidavit or to be inferred from the statement therein that the defendant cannot be found within the state? If that was the case, the legislature would doubtless have been satisfied to have the affidavit state that the defendant cannot be found within the state, and not have superadded thereto the phrase "after due diligence."

Besides, it is a fundamental rule that when facts are to be found by a judge or jury, the evidence of the existence of the requisite facts must be presented, and not the conclusion or inference of the affiant or witness that the requisite facts exist. If this were not so, the judicial function of the court or jury would be superseded, and the conclusion of the affiant or witness would be substituted instead of the judgment of the court or jury.

It is plain, from a consideration of the law, that jurisdiction of a court to render a judgment against a party to an action is ordinarily acquired by the personal service of process, as well as from the phraseology of section 135, that the order for a different mode of service may only be granted upon proof by affidavit of the existence of certain facts, and hence the fact and the mode of establishing it is jurisdictional.

Now, the fact to be proved is, that the defendant cannot be found in the state after or through due diligence used for the purpose of finding the defendant, in order to make personal service of the summons upon him. The order which is based upon the affidavit, and is in its nature and office an adjudication that due diligence has been used to find and serve the defendant personally, contains no statement in respect to diligence.

We will now turn to the decisions of the courts upon this point, and see whether they indicate any departure from the rule as above stated. In the case of *Kennedy v. New York Life Ins. etc. Co.*, 101 N. Y. 487, cited in the opinion of the learned general term in this case, and which was an action to foreclose a mortgage upon real estate, the affidavit upon which the order of publication was made stated that the defendants "cannot, after due diligence, be found within this state," they being residents of other specified states, "that the summons herein was duly issued for said defendants, but cannot be personally served upon them, by reason of such

non-residence." The affidavit in the case cited states, in the language of the statute, that "the defendant cannot, after due diligence, be found within this state, . . . but cannot be served personally upon them, by reason of such non-residence."

The affidavit in the case under consideration entirely omits the words "after due diligence," or to state that any degree of diligence whatever had been used to find the defendant. If it were competent for a party to state that he has used diligence or due diligence, then the affidavit in the case cited might be held sufficient, especially in connection with the further statement that they "cannot be served personally upon them, by reason of such non-residence."

In the case of *Carleton v. Carleton*, 85 N. Y. 313, this court held that an affidavit stating "that the defendant has not resided within the state of New York since March, 1877, and deponent is informed and believes that the defendant is now a resident of San Francisco, California," was insufficient to confer jurisdiction. The affidavit in the latter case, like the affidavit in this case, entirely omits the averment of due or any diligence, and has the like averment of the non-residence of the defendant. The opinion in the two cases (101 New York and 85 New York, *supra*) was written by the same judge, and was concurred in by all the members of the court, and moreover, the opinion in 101 New York expressly reaffirms the opinion in 85 New York, and maintains there is a distinction between the affidavit in the two cases. But the same distinction exists between the case at bar and the case in 101 New York that exists between the case in 85 New York and 101 New York, *supra*. The reasons and comments contained in the opinion in 85 New York are applicable to the case at bar, and need not be here repeated.

The case of *Jerome v. Flagg*, 48 Hun, 351, is in line with the case of *Kennedy v. New York Life etc. Co.*, 101 N. Y. 487, and the affidavit was held sufficient, upon the ground that the expression in the affidavit "that said defendant cannot, with due diligence, be served personally within the state," must be regarded, not solely as a conclusion of law, but as a statement of fact, tending to show that due diligence had been used.

To the same effect is the case of *Seiler v. Wilson*, 43 Hun, 629, and the distinction is made and followed between the Kennedy case (101 N. Y.) and Carleton case (85 N. Y.), *supra*, and

Lockwood v. Brantly, 81 Hun, 155, and *Bizby v. Smith*, 8 N. Y. 60, and *Esterbrook v. Esterbrook*, 64 Barb. 621.

The question in *Bizby v. Smith* arose collaterally in an application to be relieved from a contract to purchase a title affected by this alleged defect. The affidavit in the case cited stated that six of the defendants resided at Selina, in the state of Alabama, and one of the defendants at Greenville, in that state. The court, in the opinion in the case last cited, uses the following language: "There is no statement in the affidavit that these defendants could not be found within the state after due diligence, nor is there anything to show that any effort had been made to find them. The affidavit rests upon the naked assertion of non-residence. The order in form follows the affidavit. It recites that it appeared to the satisfaction of the court that the defendants named are non-residents of the state, and reside at the places named in the affidavit. The order fails to recite that it also appeared to the satisfaction of the court that the defendants could not, after due diligence, be found in this state. There is nothing to indicate in the order that the judge or court passed upon that question, and nothing was laid before the judge calling for his determination of that question. The order, it appears, was made by myself at chambers, in the haste and pressure of business at that court, relying on the experience of the attorney in this class of actions in the preparation of such papers and orders. I am unable to see any ground upon which the order can be treated as valid. A part of the defendants named as non-residents did not appear in the action, and as to them the judgment is inoperative."

It is, from an examination of this statute, and the decisions in relation to it, pretty evident that some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and that the simple averments in the affidavit that the defendant is a non-resident, and cannot be found within the state, are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant; for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found

after due diligence. Hence the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state.

In view of the decisions above referred to, and the cases therein referred to, we are constrained to a different conclusion from that expressed in the opinion of the learned general term in this case, "that the title of the defendant's grantor under the sheriff's deed to him in pursuance of the sale under the judgment was valid, and that the defendant derived a good title from his grantor. The plaintiff, therefore, took no interest in the property under the devise in the will of McCracken, because the grantor of his deviser had been divested of the title by the sale under the judgment against him in the attachment suit."

The judgment should therefore be reversed, and a new trial granted, costs to abide event.

PROCESS — AFFIDAVIT FOR ORDER OF PUBLICATION OF SUMMONS, WHAT MUST SHOW. — An affidavit for the service of summons by publication is sufficient when it shows a cause of action against the defendant, and that he resides at a place in another state, such place and state being designated in the affidavit. In such circumstances, no attempt to find him in the state wherein the action is pending need be shown: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 24.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LINES v. LINES.

[142 PENNSYLVANIA STATE, 142.]

GIFT BY HUSBAND DURING COVERTURE — RIGHT OF WIFE TO ASSAIL, FOR FRAUD. — A husband may dispose of his personal property by voluntary gift, during the coverture, without his wife's consent, freed from every post-mortem claim by her. She cannot, after her husband's death, assail such gift as being in fraud of her rights.

EQUITY HAS NO JURISDICTION OF A TRUST where the trust is created, and both the trustee and trust estate are in another state.

EQUITY — JURISDICTION OVER PERSONAL ESTATE IN ANOTHER STATE. — A court of equity has no jurisdiction to take the personal property of an estate situated in another state at the time of the death of the decedent, out of the hands of its custodian there, and transfer it to executors in this state. It can only be reached by ancillary administration obtained in the state where the property is situated.

TRUST DEED, WHEN NOT TESTAMENTARY. — A voluntary deed, by which personal property is conveyed to a trustee, to be divided among certain beneficiaries at a time to be selected by him, containing a power of revocation, and providing that before distribution the income shall be paid to the grantor during his life, creates a valid trust, and is not testamentary in character.

TRUST WITH RESERVE POWER OF REVOCATION. — A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the grantor, and according to the terms in which it is reserved, the validity of the trust remains as though there had never been a reserved right of revocation.

O. H. Meyers, W. S. Kirkpatrick, and R. I. Jones, for the appellant.

Alexander Farnham, H. J. Steele, and Frederick Green, for the appellees.

PAXSON, C. J. This case has been so intelligently and exhaustively discussed, both by the learned master and the

court below, that I fear anything I may say will be but a repetition of what they have perhaps better said. It certainly renders an elaboration of it unnecessary.

The appellant objects to the deeds of trust to the Union Trust Company of New York, and to William E. Lines, for two reasons: 1. That they are in fraud of her rights as widow; and 2. That they are testamentary in their character. Hence she asks that the said deeds be declared void as against her, and that the trustees may be decreed to hand over the securities, named in said deeds and remaining in their hands, to the executors of the will of Jesse Lines, deceased.

The first proposition cannot be sustained. It is the settled law of this state that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then only, do the rights of his wife attach to his personal estate. She then becomes entitled to her distributive share, and of this she cannot be deprived by will or any testamentary paper. "Who so ignorant," said Chief Justice Gibson in *Ellmaker v. Ellmaker*, 4 Watts, 91, "as not to know that a husband may dispose of his chattels during the coverture, without his wife's consent, and freed from every *post-mortem* claim by her?" This point was expressly decided and thoroughly discussed by the late Justice Sharswood in *Pringle v. Pringle*, 59 Pa. St. 281, where it was said that "a man's wife and children have no legal right to any part of his goods, and no fraud can be predicated of any act of his to deprive them of the succession." See also *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547. It is sufficient to announce a rule so firmly settled, without discussing it.

It remains to consider the second objection in connection with each of the trust deeds. That it cannot be invoked in this proceeding, so far as the deed to the Union Trust Company is concerned, is clear, for obvious reasons. That deed is a New York contract. It was made in New York; the deed was delivered in New York, and it was intended to be executed there. Moreover, the trustee is a New York corporation, and the securities in question were delivered there to the said corporation. It is almost needless to say that the court of common pleas of Northampton County has no jurisdiction of a trust where both the trustee and the trust estate are in another state. Moreover, if it be conceded that this deed is of a testa-

mentary character, it does not help the matter, so far as the present proceeding is concerned. If the securities held by the Union Trust Company are a part of the estate of Jesse Lines, it is nevertheless an estate situated in the state of New York, and a court of equity in this state cannot by its decree take it out of the hands of its custodian there and transfer it to executors in this state. It can only be reached by ancillary letters taken out in New York. It would then be subjected to the payment of the debts of the testator in that jurisdiction, and the balance only, after satisfying any such demands, would be forwarded to the executors of the domicile. This is familiar law. I may further add that the learned master has found as a fact that by the law of the state of New York a married woman has no claim and possesses no title or interest in her husband's personal estate during his lifetime, and she has no right or privilege of taking his personal estate against his last will and testament.

It remains to consider the deed to William E. Lines. It was said in *Mattocks v. Brown*, 103 Pa. St. 16: "Many deeds conveying and settling property contain provisions which become operative only after the death of the grantor or settlor, but where a present interest passes to a trustee or grantee, it has never been supposed that such instruments were of a testamentary character." I do not propose to review the numerous authorities cited and discussed by the learned master. I will add, however, that *Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547, is upon all fours with the case in hand. There the owner of certain personal property imposed a trust upon it in favor of his children, naming himself as trustee, and the trust was held valid, notwithstanding the reservation of the income to himself, and a power of revocation.

When we come to examine the deed to William E. Lines, we find an absolute conveyance to him of certain securities specified therein upon the following trusts:—

"To have and to hold all of said shares of stock unto the said William E. Lines, his executors, administrators, and assigns, upon the following trusts, to wit, in trust, to divide the same into twenty-eight equal shares, of which he shall hold fourteen shares for the use of my putative son, the said William E. Lines, and of the remaining fourteen shares he shall hold ten, to wit, one each, for the use of the ten children of my deceased sister, Mary Fairchild, named respectively . . . and the remaining four shares he shall hold for the use

of my brother, John Lines. During my life the said William E. Lines shall pay over to me and for my use, at the times he may receive the same, all the dividends or other income which he may receive upon and from all of the above-described stocks, and he may deliver the shares thereof above mentioned unto the several beneficiaries above named, at such time or times as he, in his unfettered discretion, shall think fit. And should he, in the exercise of his discretion, determine to hold the same during my life and thereafter, he may, after my death, pay the income thereof to the said beneficiaries respectively, and in their several proportions, until such times as he may see fit to transfer the principal of the said shares to the persons entitled thereto respectively," etc.

It is idle to call this a testamentary paper. It passed his entire legal title to the trustee, with a present interest. He parted with the property wholly and entirely. Even the reservation of the income to himself for life was optional with the trustee. The latter could have distributed the *corpus* of the estate to the beneficiaries the next day. The power of revocation reserved in the deed, having never been exercised, was precisely as if it had never existed. A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there had never been a reserved right of revocation: *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Stone v. Hackett*, 12 Gray, 227. There is nothing in this deed to indicate an intention to create a trust to take effect only after the death of the donor. On the contrary, the intent is clear to create a present trust in favor of the beneficiaries named therein, to take effect immediately with the execution of the deed. The securities passed into the hands of the trustee along with the trust deed. The transaction was complete, and the donor was absolutely denuded of his property. It is useless to pursue the subject further. The appellant had no case, and her bill was properly dismissed.

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

HUSBAND AND WIFE — GIFT BY HUSBAND, WHETHER FRAUDULENT AS TO WIFE. — The rule is well established by an unbroken line of authority, that the law places no restriction or limitation on the power of the husband to make such disposition by gift, voluntary conveyance, or otherwise, of his

personal property, during his lifetime, as he may elect, even though his wife is thereby deprived of the distributive share therein, which would otherwise fall to her upon his death. In other words, no doubt exists of the power of a husband, by gift or otherwise, to dispose absolutely of his personal property during his life, without the concurrence and against the protest of his wife, exonerated from all claim by her, provided the transaction is not merely colorable, and is unattended with facts indicative of some other fraud upon her than that arising from his absolute transfer of property to avoid her having an interest therein after his death. Possibly this rule does not apply when the husband is in immediate expectation of death, and attempts by a conveyance to accomplish the purposes of a will. Hence, if the disposition of his property made by a husband is absolute, reserving no right to himself, it is good as against his wife, though made to defeat her rights therein, after his death: *Cameron v. Cameron*, 10 Smedes & M. 394; *Lightfoot v. Colgin*, 5 Muni. 42; *Stewart v. Stewart*, 5 Conn. 317; *Holmes v. Holmes*, 3 Paige, 363; *Dunnock v. Dunnock*, 3 Md. Ch. 140; *Straat v. O'Neil*, 34 Mo. 68; *Poe v. Brownrigg*, 55 Tex. 133; *Cranson v. Cranson*, 4 Mich. 230; *Richards v. Richards*, 11 Humph. 429; *Padfield v. Padfield*, 78 Ill. 16; *Samson v. Samson*, 67 Iowa, 253; *Ellmaker v. Ellmaker*, 4 Watts, 89-91; *Pringle v. Pringle*, 59 Pa. St. 281; *Dickerson's Appeal*, 115 Pa. St. 199.

Under the common-law rule, a man who is *sui juris* and *compos mentis* may give away all his personal property, so as to become himself and leave his wife and children penniless. His wife and children have no legal right to any part of his personalty, and no fraud can be predicated of any act of his to deprive them of the succession: *Pringle v. Pringle*, 59 Pa. St. 281. In *McLaughlin v. McLaughlin*, 16 Mo. 242, the court said: "Our statute only endows the widow of personalty belonging to the husband at the time of his death. Hence any disposition he may make of his chattels during his life — a gift, or any disposition — to prevent the wife's dower attaching, if made during his life, will defeat the dower."

A wife has no vested interest in the personal estate of her husband. Therefore, an absolute and irrevocable, though voluntary, deed thereof, executed by him to his children by the present or a former marriage, cannot be considered a fraud on his wife's rights, nor will it be set aside at her instance: *Cameron v. Cameron*, 10 Smedes & M. 394; *Lightfoot v. Colgin*, 5 Muni. 42; *Stewart v. Stewart*, 5 Conn. 315.

In discussing a deed of gift made by a father to his children, the court, in *Padfield v. Padfield*, 78 Ill. 18, said: "Here there was a final disposition of the property. It was irrevocably distributed among his children as an advancement, and he reserved no interest, present or ultimate, in the property; and the common law has always recognized the right of a father to advance his children, when and as he might choose, without limit as to time or amount; and natural love and affection have always been held a sufficient consideration to support such gifts when executed; and this followed from the undoubted right that all men possessed, — the power of selling or disposing of their property as they choose. It is true that, where a husband still retained the right to control the property, and resume the same at pleasure, such a gift was held to be a fraud on the rights of his wife. But there the transfer was only colorable, the title still being in the husband, and being thus entitled, the wife could claim and recover her share on the death of the husband. In such case the husband still remained the owner, notwithstanding the apparent sale, and hence the wife was entitled to share

in such property, as in any other. The statute gives her a right to one third of the personal estate owned by her husband at the time of his death, after the payment of his debts, in case he dies intestate. Hence, when the sale is only colorable, and the property may be resumed by the husband, and he thus dies the owner, the wife may participate in its distribution."

In the absence of statute to the contrary, the husband who owns personal property may, as against all except creditors, make such disposition thereof as he pleases, either by will or otherwise, and he cannot therefore commit a fraud upon his wife and children by disposing of it, to take effect after his death, in any manner he may think proper: *Holmes v. Holmes*, 3 Paige, 362.

It was decided in *Cranston v. Cranston*, 4 Mich. 230, that a wife cannot claim her distributive share of her deceased husband's personal property, which he has transferred by bill of sale, and delivered shortly before his death; and the reason given was, that the delivery, whether the transaction was a gift or a sale for a consideration, consummated the transaction, and rendered it valid. The better rule would seem to be, however, that where a husband makes such disposition of his personalty during his last sickness, and in anticipation of death, with the purpose of defrauding the widow of her dower, she is entitled in equity to set aside such fraudulent disposition, in so far as it affects her rights, and to charge the grantee or donee with a trust in her favor, and to require him to make good to her that which she would have received out of the property which the husband has transferred, as if no such transfer had been made: *Straat v. O'Neil*, 84 Mo. 68; citing and approving *Davis v. Davis*, 5 Mo. 183; *Tucker v. Tucker*, 29 Mo. 350; 32 Mo. 464.

In *Stone v. Stone*, 18 Mo. 389, it was said: "Although dower is given in personal estate by our statute, yet it was not thereby intended to restrain the husband's absolute control of it during his life, — to give and dispose of it as he wills, — provided it is not done in expectation of death, with a view to defeat the widow's dower. The husband may do as he pleases with his personal property, subject to this restriction. After the enjoyment of his property in the most absolute manner during almost his entire life, the law will not permit him, at the approach of death, and with a view to defeat his wife's right of dower, to give it away." So if the transfer is a mere device or contrivance by which the husband, not parting with the absolute control and dominion over the property during his life, seeks at his death to deprive his widow of her share of his personalty, it will be ineffectual as against her: *Dunnock v. Dunnock*, 3 Md. Ch. 140; *McGee v. McGee*, 4 Ired. 106; *Littleton v. Littleton*, 1 Dev. & B. 327. The propriety of applying the principles of the common law hereinbefore stated to conveyances and other transfers made, where it does not control the property rights of husband and wife, as where the law of common or community property has been adopted, is more than questionable. Theoretically at least, in California and several other states, all property acquired by the spouses, or either of them, after their marriage, unless by gift, devise, or descent, is their common property, the husband, however, being by law constituted the agent or manager, and having, therefore, power, without the assent of his wife, to purchase, sell, and transfer any of the community assets. Very recently, in California, the power of husbands to make gifts of the community property without the assent of their wives has been denied by statute. Before the enactment of this statute, the husband's power to make transfers in fraud of his wife's interests was considered on several occasions. In *Lord v. Hough*, 43 Cal. 581-

535, the court said that "a deed of gift of a portion of the common property by the husband is not void *per se*. If the gift be made with the intent of defeating the claims of the wife in the common property, the transaction would be tainted with fraud. In the absence of such fraudulent intent, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized by the statute, which gives to the husband the absolute power of disposition of the common property as of his own separate estate. This doctrine was recognized, although not expressly decided, in the cases of *Smith v. Smith*, 12 Cal. 225; 73 Am. Dec. 533; and *Peck v. Brummagin*, 31 Cal. 446; 89 Am. Dec. 195."

In the case of *Greiner v. Greiner*, 58 Cal. 115, a wife sued her husband, alleging that during their coverture they had acquired a large amount of common property, much of which consisted of money; that he had lent portions thereof, taking as security therefor certain notes and mortgages; that with intent to cheat and defraud her of her rights in these notes and mortgages, he transferred them without consideration to certain other persons, who were defendants in the action, and who agreed to claim them as gifts, but nevertheless to hold them in secret trust for the husband, and to collect and pay to him the proceeds thereof; that the defendants to whom these transfers were made threaten and intend to dispose of the property transferred for the purpose of cheating and defrauding the plaintiff. When the case came up for trial, the court, upon motion of the defendants, excluded all testimony in support of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The majority of the appellate court concurred in views of the trial court, so far as it applied to the allegations of the complaint respecting the disposal of the community property, though the judgment was reversed, because the complaint contained some allegations respecting the disposition of some separate property of the wife under which the court thought her entitled to some relief. The complaint was criticised in the opinion of the court as not showing that the transfers assailed were necessarily in fraud of the wife, yet it proceeded farther, and indicated that though the complaint had been more complete in this respect, yet the wife, if at any time entitled to maintain an action on account of transfers made to defraud her, could never do so prior to this dissolution of the marriage, by death or otherwise; but the court further said: "It may be that the interest of the wife is sufficient while the coverture exists, on a complaint properly framed, of the character of a bill *quia timet* to procure an injunction to restrain the husband from carrying out a threatened fraudulent transfer of such property which would result in loss to her, or to compel the fraudulent donee or grantee of such property with notice of the fraudulent intent to give security to satisfy any claim which she may be found to have to it on the settlement of the affairs of the community when the marriage tie has been dissolved. Probably such an action would be maintainable by the wife: *Nance v. Cox*, 16 Ala. 129; *Lyde v. Taylor*, 17 Ala. 275. But it is unnecessary to decide this question in this case. We are satisfied that she can maintain no such action in regard to the common property as attempted herein."

The better rule, however, it seems to us, is that announced in *Bister v. Menge*, 21 La. Ann. 216, where it was decided that the power of the husband to dispose of the community property is limited to sales for value. He cannot give it away. And the rule heretofore announced in California is changed by a statute enacted March 31, 1891 (Stats. 1891, p. 425), provid

ing that the husband "cannot make a gift of such community property, or convey the same, without a valuable consideration, unless the wife, in writing, consents thereto."

The subject of transfers of property generally by the husband in fraud of the wife is treated at length in the note appended to *Thayer v. Thayer* 39 Am. Dec. 218.

LINDERMAN v. POMEROY.

[142 PENNSYLVANIA STATE, 103.]

STATUTE OF LIMITATIONS — NEW PROMISE — AGREEMENT TO ARBITRATE. —

Where a debtor claims an over-payment to his creditor by mistake, in a transaction occurring eighteen years before, and declares that he will have an account stated between them by a third party, whereupon the creditor, denying the over-payment, states that he would as "lied" have such third party examine the account as any one, and that if he owed the original debtor anything, he would pay him, such conditional promise by the creditor is insufficient as a submission to arbitration, or as a compromise of disputed rights, or as an acknowledgment of indebtedness sufficient to toll the bar of the statute of limitations.

William T. Davies, H. N. Williams, L. M. Hall, E. B. Parsons, and Albert Morgan, for the appellant.

Delos Rockwell, J. T. McCollom, and A. C. Fanning, for the appellee.

MITCHELL, J. We gather from the opinion of the learned judge below, on the motion for a new trial, that his matured view was that there was no sufficient evidence to toll the bar of the statute, and that the jury should have been directed to find for the defendant. He, however, allowed the verdict to stand, on the ground that the case, whichever way decided, would probably come to this court for final determination, and that if the judgment he entered was wrong, we could set it right without the expense of another trial. We can hardly commend the practice of entering judgment against the judge's own view of the law, and putting the additional labor upon us, for the mere purpose of saving the plaintiff's pocket. Litigation is too cheap in this commonwealth, for courts to be tender about calling upon those who indulge in it to pay for it. But the careful review by the testimony by the learned judge has greatly facilitated our labor, and saves us the necessity for doing more than applying the law to the case as stated by him.

The presumption was strongly against the plaintiff. He was the original debtor, and by his version he had overpaid,

not by one erroneous payment, but by several. He waited eighteen years, and then made his claim upon the alleged mistake. According to plaintiff's own testimony, appellant denied that there was any mistake; insisted that the plaintiff still owed him a small balance; that he knew it was right, and there was no necessity to refigure it; refused to name a man to go over the calculations; and when finally told that plaintiff would have it done any way, and by Hoffman, said he would as lief Hoffman would do it as any one. Then plaintiff, according to his own account, said: "If Hoffman does this, if I owe you anything, I will pay you; and if you owe me anything, you will pay me. 'Yes, sir,' said he (appellant). 'If you owe me anything, you must pay me; and if I owe you, I will pay you.'" It is on this promise, if at all, that plaintiff must sustain his recovery.

It is clear, in the first place, that this was not an agreement of submission to arbitration, or compromise of disputed rights. Defendant did not admit that plaintiff had ever had any claim, and if he had it was barred three times over. There was no element of reference or compromise in it, for Hoffman was not to do anything for defendant, to hear any evidence on his behalf, or to take any action that would bind him. The most that can be made out of defendant's language is an impatient, indifferent acquiescence that if a recalculation was to be made, he would as lief Hoffman should do it as any one, but without the slightest assent to be bound by the result.

As a promise to pay, it was equally unavailing, for it was clearly conditional. There was no acknowledgment of a debt, but on the contrary, a strenuous and reiterated denial. Nor was there any such acknowledgment after Hoffman's calculation was submitted to defendant. What he then said was, at most, an assent to the correctness of Hoffman's figures, but coupled at the same time with a reiteration of the denial of any debt, and an explanation that Hoffman was mistaken, because he had counted a receipt as for cash when it was only for a note. On plaintiff's own account, there never was any admission by defendant of a debt, and such promise as there was did not name any certain amount, and was merely a conditional promise to pay "if I owe you." Under all our cases, this is not sufficient. In *Emerson v. Miller*, 27 Pa. St. 278, the promise was, "he would fix it, or settle it"; in *Weaver v. Weaver*, 54 Pa. St. 152, and *McClelland v. West*, 59 Pa. St. 487, "I agree to settle with him for above balance,"

and "I agree to settle this bill"; in *Harbold v. Kuntz*, 16 Pa. St. 210, "would settle and pay all he owed him"; in *Miller v. Baschore*, 83 Pa. St. 356, 24 Am. Rep. 187, "After he is paid, I will pay you all I owe you"; in *Landis v. Roth*, 109 Pa. St. 621, 58 Am. Rep. 747, "We will pay you every dollar," and, "Yea, we will pay you"; and in *Lowrey v. Robinson*, 141 Pa. St. 189, "I will pay him when I get ready." In each case, the words used were held insufficient to toll the bar of the statute, although in several of them the words quoted were in writing, and might therefore be considered as intended for a more formal and definite acknowledgment than if they had been used in mere conversation. The present case is no stronger than any of those cited, and not nearly so strong as some of them. It must go into the same class.

Judgment reversed.

LIMITATIONS OF ACTIONS. — As to what acknowledgment on the part of a debtor will remove the bar of the statute of limitations, see note to *Landis v. Roth*, 58 Am. Rep. 749-751; note to *Shockey v. Mills*, 36 Am. Rep. 197, 198; note to *Allen v. Collins*, 35 Am. Rep. 417-420; note to *Norton v. Shepard*, 40 Am. Rep. 160-162; *State v. Finn*, 98 Mo. 532; 14 Am. St. Rep. 654, and note. An unqualified promise or acknowledgment, admitting a just indebtedness, will remove the bar of the statute of limitations: *Krueger v. Krueger*, 76 Tex. 178; *Pickering v. Frink*, 62 N. H. 342; *Gartrell v. Linn*, 79 Ia. 701; and the same is true of a conditional promise, when he who relies upon such promise to avoid the statute shows that the contingency contemplated by the promise has occurred: *Opp v. Wack*, 52 Ark. 288. But in *School District v. Cromer*, 52 Ark. 454, the court decided that a written acknowledgment, embracing a qualification which rebuts the inference of an unconditional promise to pay, is insufficient to fix a new period of limitation. A letter written in reply to a demand upon a debtor for payment, stating that the matter would receive the debtor's earliest and best attention, is evidence tending to show an acknowledgment of a debt barred by the statute: *Cole v. Putnam*, 62 N. H. 616. A debtor's indorsement upon an account presented to him in these words: "On my return from New York, I will settle the above account with P. Tuggle personally," taken in connection with his subsequent indorsement, "This agreement renewed this day," is sufficient to take the account out of the operation of the statute: *Tuggle v. Minor*, 76 Cal. 96. "Credit this on my note. . . . I will be down soon to pay the balance," is good as an acknowledgment, and extrinsic evidence may be received to identify the debt acknowledged: *Heflin v. Kieard*, 67 Miss. 522; *Opp v. Wack*, 52 Ark. 288. Alluding, in a letter, to "those old notes," the words "You shall have every cent that is due on them" is not such an acknowledgment of a just indebtedness as will remove the bar of the statute: *Stout v. Marshall*, 75 Iowa, 496.

FARQUHAR v. MCALEVY.

[142 PENNSYLVANIA STATE, 283.]

CONDITIONAL SALE. — A contract termed a "lease," by which the owner of chattels agrees to deliver them to one who agrees to pay a gross sum as "hire," the title to remain in the "lessor" until the entire "hire" is paid, but which contains no express stipulation for the return of the property at the end of the term, is a conditional sale, and not a bailment, and renders the property subject to an execution in favor of the lessee's creditors.

FEIGNED issue to try the title to chattels levied upon as the property of one Hamer, upon an execution issued in favor of one McAlevy. At the trial, the plaintiff proved the delivery of the chattels, consisting of a saw-mill engine and boiler to said Hamer, under a written order duly signed by him. Plaintiff then introduced in evidence the following instrument, termed a lease: —

"LEASE.

"This is to certify that Solomon Hamer, of Petersburg, Pennsylvania, has this day hired from A. B. Farquhar, of York, Pennsylvania, twenty to twenty-five horse Ajax engine, on Cornish boiler and wheels, No. 2 saw-mill, — valued at \$1,536, upon which — have paid \$—— advance hire, and I do hereby promise and agree to pay to him the further sum of \$1,500, as follows: \$750 in six months, \$750 in twelve months, all with six per cent interest, as hire, in advance, for the use of said machinery, so long as I shall retain it. Said hire as aforesaid to be paid on the days and times aforesaid until the sum of \$1,536 is paid. I also agree that if any installments of hire as aforesaid is not paid when due, or within three days thereafter, the said A. B. Farquhar, or his agents, can, without notice or process of law, take said machinery as above described away from my premises, without committing trespass or other violation of law, and I to forfeit the amount previously paid as hire; and I further agree to take good care of said machinery, and not to underlet, remove, or permit its removal from my premises without the written consent of said A. B. Farquhar.

"In the event of my failure to comply with any of the above conditions, then the hire paid to be forfeited; but when I have fully complied with the conditions of the above agreement, then I am to have the privilege of buying said machinery from the said A. B. Farquhar, upon my paying to him the sum of one dollar on the first day of December, 1888,

otherwise the title to said machinery to remain in the said A. B. Farquhar, as aforesaid.

"Witness my hand and seal — day of — 188—.

" — [Seal]

" — [Seal]

"SOLOMON HAMER." [Seal]

The plaintiff also put in evidence two judgment exemption notes for \$750 each, executed by Hamer to him, on which \$735.58 had been paid under the terms of the "lease." Plaintiff also introduced in evidence three letters concerning negotiations for the lease of the property. These letters were admitted, over the objection that they were written prior to the execution of the "lease," and were merged therein. Judgment for defendant, and plaintiff appealed.

H. H. Waite, for the appellant.

W. McK. Williamson, for the appellee.

Per CURIAM. We need not discuss the admissibility of the letters referred to in the second assignment of error. If we concede they were improperly received in evidence, they did the plaintiff no harm. The learned judge below ruled the case upon the construction of the article of agreement, and not upon the letters. He held that the paper called a lease, by which Solomon Hamer agreed to hire the engine and boiler from A. B. Farquhar, the plaintiff, was a conditional sale, and subjected them to execution and sale on the part of Hamer's creditors. The construction of this paper was a question of law for the court, and the learned judge ruled it correctly. It is true, it was claimed to be a lease, and the transaction a bailment, but it was not even so in form. It lacked the essential feature of a bailment, viz., a stipulation for a return of the property at the end of the term, in which respect the case differs from *Rowe v. Sharp*, 51 Pa. St. 26, where there was an express stipulation for the return to the bailor of the property at the termination of the bailment. It is of the essence of a contract of bailment that the article bailed be returned, in its own or some altered form, to the bailor, so that he may have his own again: *Benjamin on Sales*, 6; *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868. *Enlow v. Klein*, 79 Pa. St. 488, stands upon its own peculiar facts, and to that extent is authority; but, as remarked in *Stadtfeld v. Huntsman*, 92 Pa. St. 53, 37 Am. Rep. 661, we

will not go one step beyond it. The case in hand comes directly within the ruling of *Stadtfeld v. Huntsman*, and the agreement was clearly a conditional sale.

We notice that many of the Pennsylvania cases referred to in the paper-book of the appellee are cited by the name of the reporter, in violation of the rule of court. Had this been observed upon the argument, the book would have been suppressed. We regret to be obliged to call the attention of the bar so frequently to the persistent violation of our rules in regard to the preparation of paper-books.

Judgment affirmed.

CONTRACTS, CONSTRUCTION OF — CONDITIONAL SALES. — In determining the real character of a contract, the courts always look to its purposes, rather than to the name given it by the parties; and though the parties denominate it a lease, the court may adjudge it a conditional sale: *Fidelity etc. Co. v. Shenandoah etc. R. R. Co.*, 86 Va. 1; 19 Am. St. Rep. 858; *Baldwin v. Cross*, 86 Ky. 679; *Dederick v. Wolfe*, 68 Miss. 500; *ante*, p. 283. As to when a contract will be construed to be a conditional sale, and not a lease, bailment, or mortgage, see *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79, and note 81, 82; *Chickering v. Bastress*, 130 Ill. 206; 17 Am. St. Rep. 309, and note; note to *Brets v. Diehl*, 2 Am. St. Rep. 711-713; *Peck v. Helm*, 127 Pa. St. 500; 14 Am. St. Rep. 865, and note.

EVERETT v. LONDON AND LANCASHIRE INS. CO.

[142 PENNSYLVANIA STATE, 382.]

INSURANCE — WAIVER OF CONDITION CONCERNING ARBITRATION. — If insurance adjusters, in making up proofs of loss, without authority include therein the amount of loss, this alone will not constitute a waiver on the part of the insurer of a condition in the policy that the amount of loss shall be ascertained by arbitration before suit; but if the insurer receives such proofs of loss, and retains them, without objection, then the provision concerning arbitration will be deemed to have been waived.

INSURANCE — WAIVER OF CONDITION AGAINST OVER-INSURANCE. — When insurance adjusters report the total amount of insurance, and the proportionate share of the loss to be paid by each of several companies interested, this alone is not a waiver by a company not represented by them of a condition in the policy of such company limiting the amount of insurance; but if such company receives such report showing over-insurance, and that it is expected to pay its proportionate share of the adjusted loss, and retains such report without objection, it thereby waives the protection of the condition limiting the amount of insurance to be carried.

INSURANCE — WAIVER OF CONDITION CONCERNING COMMENCEMENT OF ACTION. — To constitute a waiver by the company of a condition in the policy limiting the time in which suit shall be brought after loss, the

act or declaration relied upon must be done or made during the running of the period of limitation.

INSURANCE — EVIDENCE OF WAIVER OF CONDITION LIMITING TIME OF ACTION. — Letters written by an insurance company to its agent, denying liability for a loss, but informing him that, to avoid litigation, the company would settle under certain conditions, the contents of which were not made known to the insured, nor the conditions performed, are not evidence of a waiver by the company of a condition in its policy limiting the time within which suit must be brought.

INSURANCE — EVIDENCE OF VALUE OF GOODS DESTROYED. — Where the receipt and retention of proofs of loss are relied upon as an acquiescence and agreement of the amount thereof, testimony as to the value of the goods destroyed is inadmissible.

INSURANCE — EVIDENCE OF VALUE OF GOODS DESTROYED. — Where a policy of insurance provides a specific method of ascertaining the amount of loss, parol evidence as to the value of the goods destroyed is inadmissible.

C. S. McCormick, for the appellant.

Seymour D. Ball, for the appellee.

MITCHELL, J. The first and second assignments of error raise the same question as to the effect of the entry of a judgment of *non prosequitur*, under the rule of court, and the subsequent action of the court in striking it off, that was raised and decided in *Everett v. Niagara Ins. Co.*, 142 Pa. St. 329; and for the reasons there given the assignments are not sustained.

This case, like that, comes to us as an *alias* summons, but it differs from that in the fact that the original on which the *alias* was based was not issued within the stipulated period of limitation.

The defense was the violation of three separate conditions of the policy: 1. Over-insurance beyond the amount consented to by the defendant; 2. Failure to ascertain the amount of loss by arbitration before suit; and 3. Failure to bring suit within the period limited.

The court below instructed the jury that, under the evidence, the second condition did not apply, and the third and fourth assignments relate to this instruction. The language of the learned judge can certainly not be sustained. "If this was the agreement," he says, "if plaintiff proposed to accept five thousand dollars, and the adjusters agreed that that was the amount of damage sustained, . . . there was no necessity for having an award of arbitrators to dispose of and fix that which the parties themselves had agreed and fixed among themselves; so that, in the opinion of the court, that clause of

the policy does not stand in the way of the plaintiff's right to recover." But the evidence fails to show that the adjusters had any authority to act for this defendant. Good, the only one examined, says distinctly that he did not represent the defendant, and as to Clough, the other adjuster, "I don't know that he represented them more than to write up the proofs of loss." Moreover, the papers prepared by the so-called adjusters were ordinary proofs of loss, prepared for presentation to the companies; and by the testimony of Good there was neither any agreement to pay nor any authority to make such agreement, even for the companies the adjusters represented. It was the duty of the insured, not of the insurers, to prepare the proofs of loss; and without express authority shown, no action in preparing them would in any way bind the insurers. As to this defendant, there was no evidence of any authority at all. There were six companies concerned in this loss, and the adjusters represented at least four of them, and this fact probably led the learned judge into the error. It was in evidence, however, that a copy of the proofs of loss was received by this defendant, and retained, so far as appears, without objection. Such retention was evidence of acceptance by the company, and as the fact was uncontradicted, the direction of the learned judge that the condition as to arbitration did not apply might be sustained on this ground. As he well said, there was no need of arbitration to fix that which the parties had fixed between themselves.

The fifth, sixth, and seventh assignments of error are to the submission to the jury of the question of waiver by the conduct of the company, of the conditions as to over-insurance, and as to time of bringing suit. In regard to the former, the learned judge said: "There may not be very great difficulty for the jury to find that there was a waiver of that condition when the representatives of these companies met for the purpose of adjusting the loss. The agent of this company was aware that insurance had been made to exceed the four thousand five hundred dollars." Unfortunately for this instruction, the evidence, as already noted, fails to show any agency or authority for this company in either of the adjusters. It did appear, however, that the proofs of loss received by defendant contained a schedule of the different companies insuring, the amounts of their policies, and the proportionate payment due from each on the basis of an adjusted loss of five thousand dollars. On the face of this paper, defendant

was informed that the amount of insurance on the goods greatly exceeded the limit allowed by its policy. The schedule was also notice that plaintiff was claiming only a proportion of his insurance from the other companies, in the expectation that defendant would also pay its quota. Silence as to the over-insurance, under such circumstances, might mislead the plaintiff into a settlement to his disadvantage with the other companies, and if it did so, would justify the jury in finding a waiver by estoppel. But the question was not submitted to the jury on this basis, and the ground on which it was submitted cannot be sustained, for want of evidence.

In regard to the time of bringing suit, the failure of the evidence of waiver is even more marked. The policy stipulated that no suit should be sustainable unless commenced within three months next after the loss, and the original writ in this action was not issued until eleven months after. By the terms of the policy it was too late, and the judge correctly so instructed the jury. But he also instructed them that if the defendant, after the stipulated time had expired, had been willing to pay, although denying its liability, they might find a waiver. In this there were two serious errors. The acts to constitute a waiver by implication must be done during the running of the period of limitation, not after it has expired and the rights of the parties have become fixed. In *Beatty v. Lycoming etc. Ins. Co.*, 66 Pa. St. 9, 5 Am. Rep. 318, it was said by Sharswood, J.: "To constitute a waiver, there should be shown some official act or declaration by the company, during the currency of the time, dispensing with it,—something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. . . . After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract." See also *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717; and *Lantz v. Vermont L. Ins. Co.*, 139 Pa. St. 546; 23 Am. St. Rep. 202. In *National Ins. Co. v. Brown*, 128 Pa. St. 386, it was said by our brother McCollum, "that it [the limitation against bringing suit] may be defeated by conduct which constitutes an estoppel or waiver, . . . is not denied, but there must be evidence of conduct from which an intention to waive it can be fairly inferred, or of an act which ought in equity to estop the company from relying upon it." Applying this test to the present case, the evidence submitted by the learned judge to the jury

was, — 1. The agreement of the adjusters; and 2. Certain letters written by the company to its agent in Lock Haven. As to the first, it is disposed of by the fact that no authority from this company to the adjusters was shown. As to the second, the letters were from the company, giving instructions to its own agent. They expressly denied liability, but informed the agent that, to avoid litigation, the company would settle under certain conditions. These letters were not addressed to the plaintiff; nor is there any evidence that their contents were made known to him, or that any action of his was based on them. There was no element of estoppel in them, even if they had been written during the three months of the limitation, and the weight of the evidence, in the opinion of the court below, was that they were written after the limitation had expired. As evidence of intention to waive the limitation, they were only conditional, and there is no evidence the conditions were complied with, and they were only instructions to their own agent, clearly revocable at any time prior to being made known to and acted upon by the plaintiff. In any view, they were entirely insufficient to permit the jury to find a waiver from them.

The eighth assignment must also be sustained. The evidence of Mary Sherlock as to the value of the goods was inadmissible. If the receipt and retention of the proofs of loss without objection was to be regarded as an acquiescence and agreement as to the amount, then the testimony as to the value of the goods was irrelevant; and if not to be so regarded, then the policy provided a specific way in which the value should be settled before suit brought.

It seems to be doubtful if the plaintiff can present evidence to entitle him to go to the jury on the question of waiver of the time of bringing suit, but as one of the so-called adjusters, Clough, was not examined, it is not clear that plaintiff may not be able to close the gap by his testimony.

Judgment reversed, and *venire de novo* awarded.

INSURANCE — WAIVER OF CONDITION CONCERNING ARBITRATION.— Where, after loss, the insured demands arbitration, which is refused, such refusal constitutes a waiver of arbitration: *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720, and note. The condition for arbitration is waived if the company agrees with the insured as to the amount of the loss, and to make payment at once: *Snowden v. Insurance Co.*, 122 Pa. St. 502.

INSURANCE — CONDITION CONCERNING COMMENCEMENT OF ACTION.— The absolute refusal of the insurer to pay the loss in any event is a waiver of the

condition concerning the time within which the action must be brought: *California Ins. Co. v. Gracey*, 15 Col. 70; 22 Am. St. Rep. 376. Any direct act on the part of the company which lulls the insured into security until the expiration of the time in which the action must be brought is a waiver of that condition: *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739, and note; *Insurance Co. v. Brodte*, 52 Ark. 11. A provision in a policy of insurance requiring suit to be brought within a certain time is waived by an adjustment of the loss, and a new promise on the part of the company upon which the insurer relies: *Farmers' etc. Ins. Co. v. Chesnut*, 50 Ill. 111; 99 Am. Dec. 492, and note.

QUIGLEY v. DELAWARE AND HUDSON CANAL Co.

[142 PENNSYLVANIA STATE, 333.]

RAILROADS — OBJECT OF WARNING AT CROSSINGS. — The purpose of giving warning before a railroad train or engine comes to a crossing is not only to prevent persons from driving on the track in front of the approaching train or engine, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train.

RAILROADS — NEGLIGENCE — FAILURE TO GIVE WARNING AT CROSSING — PROXIMATE CAUSE. — When the negligence of a railroad company in failing to give warning of the approach of its engine to a crossing causes the driver of a team on the highway, exercising due care, to go upon the track, where he finds himself in seemingly imminent peril from the approaching engine, and, acting as an ordinarily prudent man would have acted, he is justified in dropping the lines, jumping from the wagon, and abandoning the team; and if it then runs away and is injured, the railroad company is liable in damages for the injury, because its negligent act in failing to give warning is the natural, primary, and proximate cause of the injury.

NEGLIGENCE — LIABILITY FOR RESULTING INJURY. — One guilty of negligence is liable for whatever consequences result therefrom without the intervention of some independent agency disconnected from the primary fault, and self-operating; and this although in advance the actual result of the primary negligence may have seemed improbable.

ACTION to recover damages to a horse, alleged to have been caused by the negligence of the defendant's employees in causing a team to run away. Judgment for plaintiff, and defendant appeals.

George R. Bedford and Andrew H. McClintock, for the appellant.

John Lynch, for the appellee.

CLARK, J. In the general charge, the court instructed the jury that, inasmuch as it clearly appeared in the testimony the engineer had the locomotive in such control that he was

able to stop at least twenty feet above the crossing, it could not be said, under the circumstances of this case, that he was running at a negligent rate of speed; and that if the usual warnings had been given, the engineer would be taken to have performed his full duty in stopping the engine before he arrived at the crossing.

But the jury found that no warning had been given; that the whistle was not blown, nor the bell rung; and whilst we think the weight of the testimony was perhaps to a different effect, the court would not have been justified in withdrawing that question from the consideration of the jury. The testimony on part of the defendant, it is true, was positive. The engineer and the fireman, and also Hopkins, testified distinctly to the fact that the whistle was blown, not only at the bridge, one thousand feet, but at the third telegraph pole, four hundred feet, above the crossing. The testimony on part of the plaintiff, however, was not of a purely negative character. Quigley and Muench testify that they did not hear either the whistle or the bell until about the time the lead horse was on the crossing. They say further, however, that as the passenger train was about due, they were giving particular attention, — were listening for the whistle, — and that if it had been blown they would have heard it. Under these circumstances, their testimony is more than merely negative, and therefore could not be disregarded. The jury has found the fact, and that this failure to give proper warning, as the engine approached the crossing, was an act of negligence on the part of the engineer which is to be imputed to the company.

The jury has also found, upon competent testimony and under proper instructions, that the driver of the wagon, before attempting to cross the railroad track, stopped at a proper place, and looked and listened for the approach of a train, and did not hear the engine; and that, having started and driven upon the track, when he saw the engine approaching as it did, he acted as an ordinary prudent man would have acted, in view of all the circumstances, in jumping off the wagon to avoid the peril which seemed imminent, and in abandoning the horses and wagon to the probable consequences. The verdict of the jury involves the fact that the driver was not guilty of any negligence which contributed to the injury. Assuming this to be so, what was the proximate cause of the injury? The purpose of giving a warning before a railroad train or locomotive-engine comes to a crossing, as

the learned judge very properly said in the general charge, is not only to prevent persons from driving on the track in front of the approaching train or engine, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train. The alleged neglect of this duty caused the driver of this wagon to go upon the track, and into the peril to which he was there seemingly exposed. The dropping of the lines and the leap from the wagon, according to the finding of the jury, were such acts as an ordinarily prudent person would have done to extricate himself from the threatened danger; and they may therefore be said to have been necessitated by the negligent conduct of the company. It was the fright of the horses, and their abandonment by the driver, that caused the injury; but these causes were produced by the negligence of the defendant, who, without warning, ran the engine into such dangerous proximity to the wagon as to produce this fright of the horses, and to oblige the defendant, who felt that he was in peril, to jump from the wagon, and let the horses go without control.

It might not, perhaps, have been foreseen exactly how, or to what extent, injury would result; but the engineer, as we said in *Bunting v. Hogsett*, 139 Pa. St. 363, 23 Am. St. Rep. 192, would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency; and both his employer and himself would be held for what might in the nature of things occur in consequence of that negligence, although in advance the actual result might have seemed improbable. It is not certainly known that the lines were caught in the wheel. The witnesses say that it is "likely" they did; we do know that they were liable to be caught in the wheels, and this would account for the lead horse having been turned around, as he was. If the engineer, by his negligence, compelled the driver to abandon the horses, he would be presumed to have foreseen what was reasonably liable to occur. There was not any intervening cause, disconnected with the primary fault and self-operating, shown to exist in this case, to affect the question of the defendant's liability. The negligent act of the engineer was the natural, primary, and proximate cause of the injury.

The judgment is affirmed.

RAILROADS — DUTY TO GIVE SIGNALS AT CROSSINGS — NEGLIGENCE. — A train approaching a crossing is bound to give due warning of such approach, and the company is chargeable with negligence if such warning is not given at the distance from the crossing required by its rules: *Brown v. Texas etc. R'y Co.*, 42 La. Ann. 350; 21 Am. St. Rep. 374, and note; *McMarshall v. Chicago etc. R'y Co.*, 80 Iowa, 757; 20 Am. St. Rep. 445, and extended note; *Baltimore etc. R. R. Co. v. Walborn*, 127 Ind. 142; *Piper v. Chicago etc. R'y Co.*, 77 Wis. 247; *Lee v. Chicago etc. R'y Co.*, 80 Iowa, 173; *Rupard v. Chesapeake etc. R. R. Co.*, 88 Ky. 280; *Sherfey v. Evansville etc. R. R. Co.*, 121 Ind. 427; *Orcutt v. Pacific Coast R'y Co.*, 85 Cal. 291; *Chicago etc. R'y Co. v. Dunleavy*, 129 Ill. 133; *Petris v. Columbia etc. R. R. Co.*, 29 S. C. 303; *Crumpley v. Hannibal R'y Co.*, 98 Mo. 34; *Swift v. Staten Island etc. R. R. Co.*, 123 N. Y. 646; *Lewis v. New York etc. R. R. Co.*, 123 N. Y. 497; *Atchison etc. R. R. Co. v. Morgan*, 43 Kan. 1; *Railway Co. v. Johnson*, 44 Kan. 660; *Annapolis etc. R. R. Co. v. Pumphrey*, 72 Md. 82; *Wilkins v. St. Louis etc. R'y Co.*, 101 Mo. 94.

NEGLECT — PROXIMATE CAUSE. — To hold a party guilty of negligence, the causal connection between the negligence and the wrong must be uninterrupted by any outside agency: *Curtin v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220, and note; *Cheever v. Danielly*, 80 Ga. 115. The subject of proximate and remote cause is thoroughly discussed in a note to *White v. Conly*, 52 Am. Rep. 157-166.

PARKHURST v. HARROWER.

[142 PENNSYLVANIA STATE, 482.]

WILLS — CONSTRUCTION — CREATION OF LIFE ESTATE. — Where a testator devises land to his son for life, with remainder to his issue, if any there be at the time of his death, in fee-simple, the issue of any deceased child to take the same share and estate as the parent would have been entitled to if living at the death of the said son, and on failure of issue of said son or of his deceased child or children, the land to go to the testator's heirs at law, the son will take only a life estate, because the word "issue" means only those children and grandchildren of the son who are living at the time of his death.

C. L. Peck and John H. Orris, for the appellant.

PER CURIAM. The single question here is, whether the plaintiff has, by virtue of the devise to him by his father, Joel Parkhurst, an estate in fee-simple, in the real estate in question, which he can assure to the defendant by deed of special warranty. That portion of the will of Joel Parkhurst under which this contention arises is as follows: "I also give and devise to the said Benjamin H. Parkhurst . . . the Timothy Coates farm, to have and to hold the said last three lots of land above described, with the appurtenances, to the said Benjamin H. Parkhurst during the period of his natural

life, remainder thereof to his issue, if there be any at the time of his decease, in fee-simple, the issue of any deceased child of the said Benjamin to take the same share and estate as the parent would have been entitled to if living at the death of said Benjamin. But on failure of issue of said Benjamin, or of his deceased child or children, at the time of his death, then I direct that the said real estate, above devised to said Benjamin for life, shall at the time of his decease go to and vest in the then heirs at law of me, the said testator, in fee-simple, in such shares as the said heirs would be entitled to under the intestate laws of the state of Pennsylvania."

The contention of the appellant is, that under this will he took an estate-tail, which was enlarged into a fee by the act of 1855. On the other hand, the appellee contends the appellant took a life estate only. The court below sustained the latter proposition.

It will be seen, from a careful examination of the above clause in his will, that the testator gives to his son Benjamin, — 1. An estate for life; 2. Remainder to his issue (if there be any at the time of Benjamin's decease), and to the issue of any deceased child of the said Benjamin; and 3. Remainder to the heirs at law of the said testator, on failure of issue of said Benjamin, or of his deceased child or children, at the time of his (Benjamin's) death.

In a will, the word "issue" *prima facie* means "heirs of the body," and is a word of limitation, and not of purchase, unless there be something on the face of the will to show it was intended to have a less extended meaning, and to be applied to children only, or to a particular class, or at a particular time: *Reinoehl v. Shirk*, 119 Pa. St. 113; *Shalters v. Ladd*, 141 Pa. St. 349. It is therefore to be construed either as a word of limitation or of purchase, as will best effectuate the intention of the testator gathered from the whole instrument. It is manifest from an examination of this will that when the testator used the word "issue," he intended children and grandchildren of his son Benjamin. When he speaks of the "failure of issue of said Benjamin, or of his deceased child or children," he refers to Benjamin's death without leaving a child or children, or the issue of a child or children, surviving him, the said Benjamin. The words "issue" and "children" are used synonymously.

The words "die without leaving issue," and other expressions of the same import, standing alone, mean an indefinite

failure of issue: *Taylor v. Taylor*, 63 Pa. St. 481; 3 Am. Rep. 565; *Middleswarth v. Blackmore*, 74 Pa. St. 414. At common law, in the absence of words making a different intent apparent, the established interpretation of such expressions in a will is, that they import a general indefinite failure of issue, and not a failure at the death of the first taker; and such has undoubtedly been the rule in this state since *Eichelberger v. Barnitz*, 9 Watts. 447; *Hackney v. Tracy*, 137 Pa. St. 53. This rule, however well established, always yields when a contrary intent is clearly expressed by a testator. The language used by this testator leaves no room for doubt upon this question. He refers, as clearly as language can make it, to a failure of issue at the death of the first taker, viz., his son Benjamin. The gift to the latter "during the period of his natural life, remainder to his issue, if there be any at the time of his decease," and the words "on failure of issue of said Benjamin or of his deceased child or children, at the time of his death," all contained in the same paragraph, clearly refer to the death of Benjamin, and not an indefinite failure of issue.

We have, then, a gift to Benjamin for life, remainder to his children and grandchildren, if any there be at the time of his death; and in case there shall be neither living at Benjamin's death, then to the heirs at law of the testator as they would take under the intestate laws. We are of opinion the learned judge below was right in holding that Benjamin took but a life estate, and in entering judgment for the defendant in the case stated.

Judgment affirmed.

WILLS, CONSTRUCTION OF — LIFE ESTATE. — Where the word "heirs," as used in a will, is manifestly intended by the testator as a synonym for "children," the rule in *Shelley's case* cannot operate to defeat the testator's intention: *Conger v. Lowe*, 124 Ind. 368; *Earnhart v. Earnhart*, 127 Ind. 397; 22 Am. St. Rep. 652, and note. But see *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note 99-107. In *Gaukler v. Moran*, 66 Mich. 353, where one devised to his daughter realty, to have and to hold the same during her natural life, and after her death to her heirs and assigns forever, the court construed the devise to give the daughter a life estate only in the land.

WESTERBERG v. KINZUA CREEK AND KANE RAILROAD COMPANY.

[142 PENNSYLVANIA STATE, 471.]

CONTRIBUTORY NEGLIGENCE OF PARENT—INJURY TO CHILD.—A parent who suffers his child of tender years to wander upon a railroad track, where it is struck and killed by a railroad car, is guilty of contributory negligence, so as to bar a recovery, notwithstanding the negligence of the railroad company.

J. M. McClure and Eugene Mullin, for the appellants.

J. Ross Thompson and N. M. Orr, for the appellee.

PER CURIAM. Much as we deplore the sad accident by which the plaintiffs' two children were killed, we cannot say the court below erred in entering a judgment of nonsuit. The children referred to, both of tender years, accompanied by an elder sister of about fourteen, had been out to the woods to gather flowers. Upon their return, they were walking upon the railroad track, when a loaded coal-car, which had broken loose from the train, came down the road, struck the two younger children, and inflicted injuries of which they died.

If we concede there was negligence on the part of the company in permitting the car to become detached and run down the road without any one to control it, the fact remains that the children were walking upon the track, and while they could not be charged with contributory negligence by reason of their tender years, this suit is brought by their parents, who may be properly so charged. A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect. We have a number of cases in which this principle has been enforced. In *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375, 84 Am. Dec. 457, it was said that children of a tender age cannot be upon a railroad track without a culpable violation of duty by their parents or guardians. In *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257, it was said by Agnew, C. J.: "To suffer a child to wander in the street has the sense of permit. If such permission of sufferance exist, it is negligence." To the same point is *Cauley v. Pittsburg etc. R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664; and see also *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep.

365. *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, was much relied upon by plaintiffs, but is not in point. In that case the child was injured by the fall of a heavy platform, which when not in use rested in an upright position against a wall, yet so evenly balanced as to fall down with a slight touch. It was designated as a "dangerous trap," in the opinion of the court. Neither the children nor their parents had anything to put them on their guard against this danger. But the track of a railroad is always a place of danger, and is known to be such by every one. Aside from this, *Hydraulic Works Co. v. Orr*, as was said in *Gillespie v. McGowan*, *supra*, "is authority only for its own facts."

It was contended, however, that one of the children was killed at a crossing, and that as to the one so killed a different rule is applicable. We need not discuss this proposition, as the evidence for the plaintiffs clearly shows that the children were walking upon the track, and were killed, not at a crossing, but between two crossings. We have examined the evidence with care, and it does not sustain the plaintiffs' contention. Their own witnesses, who saw the transaction, are clear upon this point. The only fact from which a contrary inference was sought to be drawn was that some blood was found at or near the crossing. This was not sufficient to overcome the clear proof of several witnesses for the plaintiffs, two of whom were their own children. It was not enough to submit to a jury. It was but a *scintilla*, and the day is past for allowing or sustaining verdicts upon a mere *scintilla*.

Judgment affirmed.

RAILROADS — EFFECT OF PARENTS' NEGLIGENCE IN ACTIONS TO RECOVER FOR INJURIES TO OR DEATH OF CHILDREN. — In an action for injury to an infant brought by a parent, the contributory negligence of the parent is a bar to the action: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and extended note. Neglect by parents to exercise prudence will bar their recovery for injuries to their children: *O'Flaherty v. Union R'y Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318, and note; *Hooker v. Chicago etc. R'y Co.*, 76 Wis. 542; *Chrystal v. Troy etc. R. R. Co.*, 124 N. Y. 519.

The Pennsylvania rule, however, seems to be, that a railroad company is not liable for negligence resulting in injuries to children who are actually trespassers, unless such negligence is wanton or vicious, whether the action is brought for the benefit of the child or his parents: *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591, and note; *Erie etc. R'y Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471, and extended note; *Cauley v. Pittsburgh etc. R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664, and extended note.

PHILADELPHIA v. RIDGE AVENUE RAILWAY CO.

[142 PENNSYLVANIA STATE, 484.]

STATUTES. — TITLE TO STATUTE need not be a complete index to its provisions, but the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to the members of the legislature and to others specially interested.

STATUTE — TITLE OF SUPPLEMENTAL ACT. — When a statute is a supplement to a former statute, the subject of which is sufficiently expressed in its title, while the provisions of the supplement are germane to the subject of the original, the general rule is, that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto.

STATUTES. — TITLE TO STATUTE must clearly express the subject or subjects contained therein, otherwise the statute is unconstitutional and void.

JUDGMENTS — RES JUDICATA. — The recovery of judgment for taxes provided for by an unconstitutional statute in an action in which the constitutionality of the statute is not brought in question does not estop the party in whose favor the judgment is rendered from setting up the unconstitutionality of the statute in a subsequent action between the same parties upon a different cause of action.

ESTOPPEL — CONSTITUTIONALITY OF STATUTE. — Where a city has demanded and received taxes for several years under an unconstitutional statute, treating it as if valid, it is estopped from claiming additional taxes for those years on the ground that such statute is unconstitutional.

J. Howard Gendell and John G. Johnson, for the appellant.

Abraham M. Beitler and Charles F. Warwick, city solicitor for the appellee.

CLARK, J. It appears from the case stated that the Ridge Avenue Passenger Railway Company resulted from the merger and consolidation, under the statute, of the Girard College and the Ridge Avenue and Manayunk passenger railway companies; the former incorporated under the act of April 15, 1858 (P. L. 300), and the latter under the act of March 28, 1859 (P. L. 264). By the terms of their respective charters, the original companies were required, annually, to "pay into the treasury of the city of Philadelphia, for the use of the said city, whenever the dividends shall exceed six per centum per annum on the capital stock, the sum of six per centum on the said dividends thus declared." After the consolidation, however, an act of assembly was approved March 8, 1872 (P. L. 264), entitled "An act relating to the Ridge Avenue Passenger Railway Company," which provided that the said company should pay annually into the treasury of

the city of Philadelphia, for the use of the said city, "a tax of six per centum upon so much of any dividend declared which may exceed six per centum upon their said capital stock," etc. It is now contended on the part of the city that this act of 1872 was in conflict with section 8, article 11, amendment of 1864, of the constitution of this state, in force at the time of its passage, and that the company therefore remains liable for the greater tax imposed in the original charters. The company having paid and the city having received the taxes according to the provisions of the act of 1872 for the years 1880 and 1888, inclusive, this suit is brought to recover the balance which would remain unpaid for these years according to the rate fixed in the original charters.

The provision of the constitution was as follows: "No bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills." Article 3, section 3, of the present constitution is precisely to the same effect; it differs from the amendment of 1864 in phrasology only.

Although it is not necessary that the title to an act of assembly should be a complete index to its provisions, all the cases agree that the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to the members of the legislature, and to others specially interested: *Commonwealth v. Green*, 58 Pa. St. 233; *Dorsey's Appeal*, 72 Pa. St. 192; *Beckert v. Allegheny*, 85 Pa. St. 191; *In re Phoenixville Road*, 109 Pa. St. 44; *Sewickley Borough v. Sholes*, 118 Pa. St. 165. A distinction exists, however, between the title to an original act and that of a supplement. When an act of assembly is a supplement to a former act, if the subject of the original act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is, that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto: *State Line etc. R. R. Co.'s Appeal*, 77 Pa. St. 429; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; 32 Am. Rep. 417; *In re Pottstown Borough*, 117 Pa. St. 538; *Milvale Borough v. Evergreen Ry Co.*, 131 Pa. St. 19. Although the cases at the outset, after the adoption of this amendment, were a little loose in its construction, yet if the distinction just referred to is kept in

view, they will be found to have established a reasonably consistent rule, which may now be recognized as the settled law of the state.

The question of the constitutionality of the act of March 8, 1872, upon the ground of its defective title, was on a previous occasion argued in this court before a full bench; and in a *per curiam* opinion it was held that the subject of the bill as it was passed by the general assembly was not clearly expressed in the title: *Ridge Ave. Pass. R'y Co. v. Philadelphia*, 124 Pa. St. 219; and upon that ground the act was held to be in conflict with the constitutional provision referred to. In the case cited, the company sought to have the advantage of a provision of the act of 1872 relieving it from the burden of repairing the streets, — a burden imposed by the original charters, and releasing the company from control by the city councils, — whilst in this case the company seeks to have advantage of a provision of the same act, which would in part relieve it from the payment of city taxes. If the title of the bill was not so expressed as to warn the city as to the former feature or effect of the bill, it was clearly defective as to the latter, for there is no reference in the title to either; indeed, there was nothing expressed in the title to call the attention of the city that her rights were in any way affected by it. We are not inclined to change the conclusions to which we came in the case referred to, nor to recede from the rule so well settled in our cases. It follows that the act of 1872 must be treated as unconstitutional, and therefore void, in so far, at least, as it affects the rights of the city and changes the rate of taxation for city purposes.

But assuming that upon this ground the act of 1872 is unconstitutional and void in so far as it affects the rights of the city of Philadelphia, and that the company was and is liable according to the provisions of the original charters of 1858 and 1859, is the city now in condition to insist upon that measure of liability for the years 1880 to 1888, inclusive? It appears that some time after the year 1879, the city brought suit against the company for the taxes of 1872 to 1879, inclusive. The claim was for taxes according to the provisions of the act of 1872. The company, admitting its liability under that act, contended that upon a proper construction of the act it was not liable for tax, excepting when any single or separate dividend declared exceeded six per cent of the authorized capital of the company. The city's con-

tention was, however, that as upon this construction of the statute the company could declare dividends as often as the directors desired, they might so manipulate their dividends as to defeat the manifest design of the legislature to provide revenue for the city. Suit having been brought, as we have said, defense was taken, and such proceedings were afterwards had that the cause came into this court upon a writ of error, where it was held that the extent of the company's liability under that act was to be ascertained by applying the aggregate annual dividends to the capital actually paid in, and judgment was entered against the company accordingly. The constitutionality of the act of 1872 was not drawn in question, and the company was compelled to pay according to the demands of the city under the provisions of that act: *Philadelphia v. Ridge Ave. Pass. R'y Co.*, 102 Pa. St. 190.

The argument of the company's counsel now is, that although in the case referred to the point does not appear to have been made or decided, yet the constitutionality of the act of 1872 must be taken to have passed *in rem judicatam*; that the judgment in that case necessarily involved a decision that the statute imposing the tax was to that extent valid, and although the cause of action is not the same, the city is estopped of record from relitigating that question. In support of this doctrine they cite *Beloit v. Morgan*, 7 Wall. 619; *Aurora City v. West*, 7 Wall. 85; *Durant v. Essex Co.*, 7 Wall. 107; *Corcoran v. Chesapeake etc. Canal Co.*, 94 U. S. 741; *Wilson v. Deen*, 121 U. S. 525; and *Duchess of Kingston's Case*, 2 Smith's Lead. Cas., 8th ed., 941.

Whilst the general rule declared in these authorities is undoubtedly correct, it does not extend to estop a person from setting up the unconstitutionality of a statute when the cause of action is not the same. The former judgment is absolutely conclusive upon the parties as to the cause of action involved in it, although the statute upon which the proceedings were taken was not constitutional; that judgment can only be impeached collaterally for fraud or want of jurisdiction. It is a matter of no consequence now that the act of 1872, upon which judgment was entered for the amount of the tax, was unconstitutional and void; judgment having been entered, and no appeal taken, the subject-matter of the issue in that suit is *res judicata*. The former judgment, therefore, operates as a bar to any subsequent action founded on the same demands: Bigelow on Estoppel, 80-88. In the case

at bar, however, whilst the point in issue may perhaps be the same; the cause of action is different; and although the verdict with the judgment thereon would furnish conclusive evidence of the matters in controversy upon which the verdict was rendered, and operate as a bar to the further litigation thereof, it would not preclude the plaintiff in this suit from asserting the unconstitutionality of the act upon which the previous action proceeded: *Bigelow on Estoppel*, 90-103.

The distinction is thus stated by Mr. Justice Field in *Cromwell v. Sac County*, 94 U. S. 852, 858: "It should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This same distinction is illustrated in *Outram v. Morewood*, 3 East, 346, which is a leading case of high authority upon this subject; in *Gardner v. Bucklee*, 3 Cow. 120; 15 Am. Dec. 256; in *Bette v. Starr*, 5 Conn. 550; 18 Am. Dec. 94; and in *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 646. See also *Washington Packet Co. v. Sickles*, 24 How. 842; *Davis v. Brown*, 94 U. S. 423. The doctrine as we have stated it is consistent with our own cases: *Long v. Long*, 5 Watts, 102; *Kilheffer v. Herr*, 17 Serg. & R. 319; 17 Am. Dec. 659; *Smith v. Elliott*, 2 Pa. St. 345.

But from the year 1880 to 1887, inclusive, the city has, from year to year, formally rendered their claims and demanded payment of taxes from the company, under the provisions of the act of 1872, which demands, as they were made, were met by prompt and full payment. These demands were for the whole, and not for any portion, of the taxes supposed to be due and owing for these years respectively, and were paid and receipted for in full. Whether the act of 1872 was in conformity with the constitution or not was matter of law, not of fact. The city chose to treat it as a valid enactment, and to collect the tax it imposed, and having done so, we are of opinion she must be taken to have waived or relinquished her right to receive more. She cannot in this manner repudiate the authority under which she assumed to act, to the prejudice of the company's rights. The company accepted the results of the litigation which the city originated, and paid the taxes annually, at the rate demanded, and in accordance with the judgment of this court. Relying upon the annual adjustment of these taxes, the company, from time to time, declared dividends and distributed their surplus earnings among the stockholders, and upon these dividends, presumably larger by reason of the reduced burden of taxation, the city has from year to year received the tax at the rate demanded. *Non constat* that the stockholders then are the stockholders now, or were stockholders when this suit was brought. The city could not split up her claim in this way to the prejudice of the company, and we are of opinion that in so doing she must be held to have waived and relinquished her right to receive beyond the amounts from year to year demanded.

It is plain that if the parties had treated the act of 1872 as unconstitutional, and the taxes had been paid and received pursuant to the original charters, a subsequent adjudication that it was a valid enactment would not entitle the company to receive back the excess, and this is but the converse of the proposition now advanced by the city. It is said to be a poor rule that will not work both ways. The city cannot occupy inconsistent positions. Having chosen to treat the act of 1872 as constitutional, and proceeded against and treated with the company accordingly, she will not now be permitted to rip up the annual settlements made under it, to the prejudice of others' rights.

As to the taxes for the year 1888, and for the years subse-

quent to that, the city is entitled, under the provisions of the acts of 1858 and 1859.

The judgment is therefore reversed; and judgment is now entered, on the case stated, in favor of the plaintiff, and against the defendant, for \$1,512, and costs.

STATUTES — TITLE. — As to what the title of an act must contain, as well as what need not be expressed therein, see *Hronck v. People*, 134 Ill. 139; 23 Am. St. Rep. 652, and note. An amendatory act which merely recites in its caption the title of the act sought to be amended, without enlarging its scope, is constitutional and valid, provided its purview is germane to the title of the original act: Note to *Winona v. School District No. 82*, 12 Am. St. Rep. 696. The title of an act need not specifically mention every subdivision of the general subject, provided the subject considered in the body of the act is germane to the general subject expressed in the title: *Baldards v. Denver etc. R. R. Co.*, 13 Col. 59.

RES JUDICATA — ESTOPPEL. — As to what does not constitute *res judicata*, see *Sloan v. Price*, 84 Ga. 171; 20 Am. St. Rep. 254, and note; note to *Hamm v. Evans*, 14 Am. St. Rep. 252; note to *Gayer v. Parker*, 8 Am. St. Rep. 230, 231; note to *Lea v. Lea*, 96 Am. Dec. 779-788; the general rule of former adjudication does not apply to an instance where the constitutionality of a statute is sought to be raised, even though that question might have been examined into and determined in the first instance, but was not: *Boyd v. Alabama*, 94 U. S. 645, cited in the note to *Lea v. Lea*, 96 Am. Dec. 779-788. In *Weaver v. Brown*, 87 Ala. 533, defendant was allowed to set off a cross-demand in an action to enforce a vendor's lien, although he might have, but did not, set off the same in a former suit between the same parties to recover on a note given for purchase-money.

SUMMERS v. BERGNER BREWING COMPANY.

[143 PENNSYLVANIA STATE, 114.]

CHILD FOUR YEARS OLD CANNOT BE HELD RESPONSIBLE FOR CONTRIBUTORY NEGLIGENCE.

NEGLECT OR RASHNESS OF CHILD CANNOT BE ASSUMED WHEN. — Where a child four years old is run over by a team and wagon on a public street, in the absence of anything to indicate that she ran hastily or impulsively under the horses or the wagon, it cannot be presumed that she did so; nor can be it assumed that she was a trespasser, or that her actions were negligent or rash, merely because her evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on the point, the reasonable inference is, that she was run over while crossing or playing in the street.

QUESTION OF DEFENDANT'S NEGLIGENCE FOR JURY TO DETERMINE WHEN. —

Where a child four years old is run over and injured on a public street by a heavy team and wagon moving down grade at a rapid gait, the driver thereof being asleep at the time, it is a question for the jury to determine whether the driver's negligence caused the injury.

RECORD IN CRIMINAL ACTION INADMISSIBLE IN CIVIL SUIT WHEN. — In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's driver, the record of a criminal action against such driver is not relevant to the issue, and is therefore properly excluded.

ACTION to recover damages for personal injuries. The third point of the appellant, referred to in the opinion, is as follows: "No person, in driving through the street, is bound to anticipate that a person, either child or adult, may suddenly run in front of or under his horses, and get injured; and if any injury does happen under such circumstances, the driver would not be negligent, and there could be no recovery against him or his employer. Answer: I decline that point." The record in the suit of *Commonwealth v. Dillens*, was offered in evidence "to show that at that time there was no contention on the part of Mr. Summers that this driver was asleep, and that he prosecuted him for assault and battery on this child." Other facts are stated in the opinion.

John and James P. Dolman, for the appellant.

John G. Johnson and Thomas Diehl, for the appellee.

McCOLLUM, J. May Summers, a child four years old, by her next friend and father, brought this action against the Bergner and Engel Brewing Company, to recover damages for injuries she received by being run over on a public street in Philadelphia by a team and wagon belonging to the defendant company, and then engaged in its work and in charge of its employee. It is alleged that the accident was the result of the negligent driving of the team. There was evidence that at the time of the occurrence the driver was asleep, and that the team was on a descending grade and going at a rapid gait. The child, when discovered, was upon her feet and being turned around between the fore legs of one of the horses; but before she could be rescued, she was thrown down and struck by one wheel of the wagon, and sustained injuries from which she has never recovered, including the loss of the sight of one eye. The negligence and the accident were, under the evidence, closely connected, and to the ordinary observer inseparable. The inference that the former caused the latter is not a strained one, but a reasonable and natural result of the testimony. Aside from the statement of the driver, whose account of the affair was incoherent and confused, there was nothing to indicate that

the child ran hastily or impulsively under the horses or the wagon, and certainly there is no presumption that she did so. Besides, a child four years old cannot be held responsible for contributory negligence. We cannot assume that she was a trespasser, or that her actions were negligent and rash, merely because her evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on this point, the reasonable inference is, that she was run over while crossing or playing in the streets; and when, as here, it affirmatively appears that the driver was asleep, and the heavy team and wagon were moving down grade at a rapid gait, it is a question for the jury whether the negligence of the defendant caused the injuries.

In *Hestonville Pass. R'y Co. v. Connell*, 88 Pa. St. 520, 32 Am. Rep. 472, cited by the appellant, it was held that there was no defect in the car, or neglect in its management, and that the company was not responsible for injuries received by a child from his sudden and unexpected attempt to mount the front platform of the car, while the driver, who was also conductor, was on the rear platform, and could not have foreseen or guarded against the act; but Mr. Justice Gordon, in delivering the opinion of the court, said: "It is not a case of mere negligence on the child's part, as if it had been run over whilst crossing or playing in the street; that would raise a question very different from the one in hand." In *Lombard R'y Co. v. Steinhart*, 2 Penny. 358, substantially the same questions were raised that we are invited to consider in this case, and they were decided against the company. There is a striking resemblance between the company's sixth point in the case cited and the appellant's third point in the case under consideration. In *Lombard R'y Co. v. Steinhart*, 2 Penny. 358, the plaintiff recovered a verdict in the court below, and in affirming the judgment, this court said: "The main question, then, was, whether the negligence of the railway company caused the injury. While some of the evidence was conflicting, yet there was amply sufficient, if believed, to justify the jury in finding it as a fact. There was evidence that the driver of the car was intoxicated, and driving at a rapid rate of speed, without giving that attention to the observance of any object on the track which his duty required."

There was no exception taken in the court below to the

admission of evidence that the loss of sight was attributable to the accident, nor was the court requested to withdraw it from the jury. It is now suggested and argued that the testimony on this point was insufficient to justify an inference that the defect of vision was the result of the casualty, and we are requested to convict the court below of error because there was not an unsolicited instruction to that effect. It is an unusual request, but as we think the testimony of the experts required the jury to determine whether the loss of sight was one of the disabilities caused by the accident, we dismiss it without further comment.

The record of the suit in the court of quarter sessions between the commonwealth and John Dillenz was not relevant to this issue, and was therefore properly excluded.

The specifications of error are overruled, and the judgment is affirmed.

NEGLIGENCE — CHILDREN. — As to what negligence of an infant may bar recovery for personal injuries, see extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596, in which the rule applied in Pennsylvania cases is discussed. Compare *Rodgers v. Lees*, 140 Pa. St. 475; 23 Am. St. Rep. 289, and note; *Illinois R'y etc. Co. v. Hedrick*, 1 Wash. 446; 22 Am. St. Rep. 162, and note; *Tucker v. New York etc. R. R. Co.*, 124 N. Y. 302; 21 Am. St. Rep. 670, and note; *Winters v. Kansas City etc. R'y Co.*, 29 Mo. 509; 17 Am. St. Rep. 591; *Illinois C. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242, and note; *Strasbridge v. Bradford*, 128 Pa. St. 200; 15 Am. St. Rep. 670, and note; *Rolling Mill Co. v. Corrigan*, 48 Ohio St. 283; 15 Am. St. Rep. 502.

SHACKAMAXON BANK v. YARD.

[148 PENNSYLVANIA STATE, 129.]

BOND OF CASHIER OF BANK COVERS WHOLE PERIOD OF HIS SERVICE, WHEN.

— Where the cashier of a bank gives to it an official bond, reciting his election as cashier, and conditioned that if he "shall, for and during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position, or whether under its present organization or charter, or under any renewals or extension thereof, discharge and fulfill with integrity and fidelity the trust thereby reposed in him, and faithfully and honestly execute the duties that may be assigned him, then the above obligation to be void, or else to be and remain in full force and virtue," such bond will protect the bank during the whole time of his service as cashier, and during the existence of the bank, notwithstanding the law required the cashier of the bank to be elected annually, and no formal election was had from year to year. And the executrix of a surety on such bond is liable for a breach thereof, although such breach occurred after the

death of the surety, and after the bank had notice of his death. The continuous service of the cashier, beginning in a formal election, and extended by mutual consent with the acquiescence of all parties interested, is sufficient to fix the liability of the surety on his bond.

DEBT on a bond of Charles S. Murphy, the defendants' testator, as the surety of Thomas L. Huggard, the cashier of the plaintiff. It appeared at the trial that no default occurred on the part of Huggard until more than a year after the death of Murphy was known to the bank, but extensive defaults occurring thereafter were shown in breach of the bond. Other facts are stated in the opinion.

R. C. McMurtrie, for the appellant.

Alexander Simpson, Jr., and A. W. Horton, for the appellees.

WILLIAMS, J. This action was brought upon a cashier's bond. The defense made by the surety rests on his construction of the condition in the bond. It appears that one Thomas L. Huggard was elected cashier of the Shackamaxon Bank in 1878, and gave a bond to secure the faithful discharge of his duties, with Murphy as surety. It is clear that all the parties contemplated the establishment of permanent relations between the bank and its cashier. They knew that the office was an annual one, and that a bond in the ordinary form would impose no liability beyond the current year. They undertook, therefore, to provide against the necessity for an annual renewal of the bond, and to extend the security afforded by it so as to cover the whole period of Huggard's service as cashier, by giving to the condition the following form: "If the said Thomas L. Huggard shall, for and during the time of his employment by said bank, whether under his present election or under any subsequent election to the said position, or whether under its present organization or charter, or under any renewals or extensions thereof, discharge and fulfill with integrity and fidelity the trust," etc.

The bank relied on the bond in this form, and did not require its renewal, and Huggard remained in the employment of the bank, as its cashier, down to the time of its disastrous failure in 1885. A course of fraudulent conduct was entered upon by him, as we understand the evidence of Mr. Faunce, the expert accountant, in 1877 or 1878, which continued until, and which greatly contributed to if it did not occasion, the final collapse. Some time after the bank was closed, this action was brought upon the cashier's bond, and the surety

asks to be relieved from his undertaking because the evidence does not show a formal re-election of his principal year by year to the office of cashier. The learned judge of the court below thought the position well taken, holding that the phrase "under the present election or any subsequent election" should be understood as restricting, rather than enlarging, the preceding clause, "during the time of his employment by the said bank"; and that to render the surety liable, a formal re-election annually must be shown by the plaintiff. Our inquiry, then, in the first place, is, whether the words referred to are restrictive or enlarging in their operation, and next, whether a formal re-election is necessary in order to continue the liability of the surety.

The condition was intelligently framed. The scrivener seems to have been aware of the general doctrine affecting the liability of sureties on official bonds, as laid down in *Addison on Contracts*, 1117, and as applied in the *Manufacturers' & M. S. & L. Co. v. Odd Fellows' Hall Ass'n*, 48 Pa. St. 446. Instead, therefore, of making the bond relate to the term to which Huggard was elected, he used the words "during the time of his employment by the said bank" as cashier. Then, as if apprehensive that these words might also be restricted to the term to which Huggard had been elected, he added the further words, for the express purpose of enlarging the scope of those previously employed, "whether [such employment shall be] under his present election or under any subsequent election to the said position." The fear seems, then, to have suggested itself that even these words were not broad enough, because they might be held to be limited to the present charter. He then adds, to relieve against this danger, the further words, "or whether under its present organization or charter, or any renewals or extensions thereof." The object of these explanatory sentences was to relieve against the fear that the previous words might be held to relate to the present term of Huggard, or to the present form of organization under the existing charter of the bank, and by express words to so enlarge the condition as to exclude such interpretation of it. In this form it was intended to protect the bank during the time of Huggard's employment as cashier, and during the existence of the bank, though acting under a renewal or extension of its charter at the time a breach should occur. In this form it was executed by both principal and surety, and accepted by the bank. The purpose to make the bond impose a con-

tinuing liability, and relieve against the necessity for annual renewals, was a lawful one, and the words employed for that purpose are apt and sufficient.

The question is not new or barren of authority. In *Mayor of Berwick v. Oswald*, 8 El. & B. 658, a person was elected borough treasurer, which was then an annual office. He gave bond for the faithful performance of his duties as treasurer "during the whole time of his continuing in said office in consequence of the said election, or under any annual or other future election to the said office." The bond was given in 1842. He held the office until 1848. The term had been changed meantime so that it became an office to be held during the pleasure of the borough councils, instead of an annual one. The default occurred after the change of the term, and the appointment of the treasurer for an indefinite term. The surety pleaded these facts as a defense, but the court regarded them as insufficient, and held that the surety was liable for the default occurring after the change in term of office, and while the treasurer was holding under an appointment made after such change had taken place. The same question was raised in *Mayor of Dartmouth v. Silly*, 7 El. & B. 97, and the same rule was held. It may be regarded as settled, that the obligation of a bond for the faithful discharge of the duties of an office or an employment is co-extensive with the duration of the office or employment. If the office is for life, the liability of the surety will continue during the life of the incumbent. If the term is indefinite, as during good behavior, or at the pleasure of the employer, the liability of the surety is indefinite, and will continue until the will of the employer is exercised and the term ended: Addison on Contracts, sec. 1118. Substantially the same rule was applied in *Coe v. Vogdes*, 71 Pa. St. 383. The action in that case was against the surety of a tenant who had held over, and was in arrears for rent. The lease was for one year, but contained a stipulation that if the tenant should remain in possession after the end of the term, the lease should "continue for another year, and so on from year to year until legal notice is given for a removal." The sureties signed a stipulation, agreeing to be liable for the performance of the lease on part of the tenant. The rent for the first year was paid, but the tenant held over and the sureties were notified. They thereupon gave notice that they would not be further liable, and the tenant paid to the end of the then current year. The action was for rent accruing during

a subsequent year. The sureties replied, first, that they were only liable for the original term of one year; and next, that after the year expired, they had given notice of their refusal to be bound. They were held liable for the tenant's performance, not only during the first year, but during the holding over; and this court said that "a mere notice by a surety that he would not be liable was no defense; he could not dissolve the contract at pleasure."

The remaining question is, Was Huggard still in the employment of the bank as cashier when the default sued for occurred? It is conceded that he was acting as cashier at the time, and that it was because of that fact that it was possible for him to inflict the injury complained of. It is conceded, also, that the bank recognized and accepted him as its cashier, trusted him with the custody of its funds, paid him his salary, and held him out to the world as such. He could not deny his official relation to the bank, nor could the bank disavow or repudiate his acts done in their service within the scope of a cashier's authority. As Huggard and the bank employing him are concluded by their conduct, both as to the public and each other, the surety, standing on the same ground with his principal so far as the writing is concerned, is also concluded. The employment of the principal as cashier with the position and emoluments legitimately belonging to the office was the object of the bond. This object was secured, and the principal was for twelve years in possession of it. If the action of the directors was irregular, the irregularity was never taken advantage of. If his title to the office lacked authentication by the record of a formal election, nobody ever questioned his right or suggested a doubt about his powers. If either he or the bank could have set up want of an annual re-election as an excuse for terminating the relation between them; neither did so, but both waived the want of form, and continued the official relation. No form of election is provided for by the statute; and none is made necessary by the bond. So far as the liability of the principal or surety on this bond is concerned, continuous service, beginning in a formal election and extended by mutual consent with the acquiescence of all parties interested, is enough.

The judgment of the court below is now reversed, and judgment is now entered on the points reserved in favor of the plaintiff.

BANKS AND BANKING — CASHIER — BOND. — The bond of a cashier of a bank having in its terms no limit as to duration is broad enough to cover a continuing liability: *Blam v. Commercial Bank*, 86 Va. 92; where the duration of the office is not fixed by statute or the by-laws of the banking corporation: *Humboldt Sav. etc. Soc. v. Wennerhold*, 81 Cal. 528; but in case the statutes require the election of a cashier annually, the rule seems to be otherwise: *Savings Bank v. Hunt*, 72 Mo. 597; 37 Am. Rep. 449. Compare *Citizens' Loan Ass'n v. Nugent*, 40 N. J. L. 215; 29 Am. Rep. 230; *Hall v. Brackett*, 62 N. H. 509; 13 Am. St. Rep. 588.

In *Kaw Life Ass'n v. Lemke*, 40 Kan. 661, it was decided that the bond required by the statute of Kansas to be given by certain life insurance companies was in the nature of an official bond the obligation of which did not extend beyond the official term of the officers who gave it.

BODEY v. THACKARA.

[143 PENNSYLVANIA STATE, 171.]

MECHANIC'S LIEN ON WIFE'S SEPARATE ESTATE UNDER CONTRACT SIGNED BY HUSBAND ALONE. — The separate property of a married woman may be charged with a mechanic's lien for materials for the erection of a building thereon, although the contract under which they were furnished is signed by her husband alone, where it is shown that she examined the plans for the building, that the materials were furnished by the claimant with her knowledge and consent, that they were reasonably necessary for the improvement of the property, and were used for that purpose, and that she was frequently upon the premises during the progress of the work, giving directions as to the materials and as to the manner of construction.

WIFE BOUND BY CONTRACT MADE BY HER HUSBAND WHEN. — Where a wife assents to a contract made by her husband for materials to be used in the erection of a building upon her separate estate, and knowingly receives them and assents to their application to her property, she is bound by such contract.

EVIDENCE ADMISSIBLE IN ACTION ON MECHANIC'S LIEN. — Where, in *scire facias* *sur* mechanic's lien, brought by a subcontractor, it appears that the original contract, though signed by the husband alone, was assented to by the wife, and that the materials were furnished for and used in the improvement of her separate estate, the original contract and the claimant's books of original entry charging the husband with the materials for which the claim is made, are admissible in evidence. But evidence that the defendant paid the contract price in full to the original contractor is not admissible.

SCIRE FACIAS *sur* mechanic's lien. The rulings referred to in the opinion were, admitting in evidence the original contract between A. M. Thackara and L. W. Kitzelman, and the plaintiffs' books of original entry showing an account containing the same items as the bill of particulars attached to the claim and charged to "L. W. Kitzelman, for Lieutenant

Thackara's house, Rosemont," and rejecting the defendants' offer to prove that they had paid the contract price for the erection of the house, in full, to the contractor. Other facts appear from the opinion.

F. G. Hobson and William H. Pease, for the appellants.

Irving P. Wanger and B. E. Chain, for the appellees

STERRETT, J. This *scire facias sur mechanic's lien* was issued by the plaintiffs, Bodey and Livingston, against the appellants, Alexander M. Thackara and Eleanor Sherman Thackara, his wife, in right of said wife, owners or reputed owners, and L. W. Kitzelman, contractor, to recover for materials furnished in and about the erection of the house.

It appears that the written contract of July 15, 1887, with Kitzelman, for the erection of the building on land conveyed to the defendant Mrs. Thackara about two months before, was made in the name of and executed by Lieutenant Thackara, without his wife joining therein. It was claimed by the plaintiffs, and evidence was introduced tending to prove, that Mrs. Thackara assented to the contract, which was in fact made by her husband on her behalf and for her benefit; that the materials were furnished with her knowledge and consent; that they were reasonably necessary for the improvement of her separate estate, and were used for that purpose; that Mrs. Thackara was frequently upon the premises during the progress of the work, giving directions as to the materials that were being furnished by the plaintiffs, and also as to the manner of construction; in short, that she understandingly acted as though she herself, and not her husband, was one of the parties to the written contract. Without undertaking to review the evidence tending to prove the plaintiffs' contention that the contract was made for Mrs. Thackara and fully adopted by her, reference may be made to the proof that she examined the plans for the building, watched the progress of the work, visited the plaintiffs' mill, urged them to push on the work, etc. In her letter to them of November 1, 1887, she wrote: "The wood sent so far is excellent and greatly admired, but . . . please push these parts and the doors through as soon as possible, and greatly oblige." Again, in her letter of November 29, 1887: "We want Mr. Kitzelman to put on seven carpenters, but he says you will not keep them in work. With a few lines from you saying you will send the wood fast and

constantly, I can urge him on." The evidence was abundantly sufficient to warrant the jury in finding the facts as claimed by the plaintiffs. It was fairly submitted, in a clear and correct charge, and the verdict must be accepted as a finding of all the facts necessary to entitle the plaintiffs to recover.

In view of the facts established by the verdict, there was no error in the rulings complained of in the first three specifications of error; nor was there any error in charging, as recited in the fourth specification, "that a husband cannot, by making a contract like this, charge his wife's property, unless it appears that the materials were furnished with her knowledge and consent. If she assented to the contract made by her husband in this respect, . . . if she knowingly received the goods, assented to the application of the goods to her property, she is bound by the contract."

There was no error in the answer of the learned judge to either of the defendant's points, and hence the remaining specifications of error are not sustained. As already intimated, the right of the plaintiffs to recover hinged upon questions of fact which were properly submitted to the jury and by them found in favor of the plaintiffs.

Judgment affirmed.

MECHANIC'S LIEN ON WIFE'S REALTY UNDER CONTRACT MADE BY HUSBAND. — A building necessary for the improvement of the separate estate of a wife, erected thereon under a contract made by her husband alone, but with her knowledge and consent, is subject to a mechanic's lien for materials reasonably necessary for its erection, furnished upon the order of the contractor, and used in the construction: *Brown v. Thackara*, 142 Pa. St. 102; *post*, p. 529.

HUSBAND AND WIFE — HUSBAND AGENT FOR WIFE. — A wife is liable for articles purchased for her separate estate by her husband acting as her agent: *Brown v. Thompson*, 30 S. C. 436; 17 Am. St. Rep. 40; *Smith v. Pydstree*, 2 Eln. 96; 48 Am. Dec. 173; *Cutler v. Eveleigh*, 4 Dougl. Eq. 10; 6 Am. Dec. 494.

BEVAN v. THACKARA.

[143 PENNSYLVANIA STATE, 182.]

MECHANIC'S LIEN ON WIFE'S REAL ESTATE UNDER CONTRACT MADE BY HER HUSBAND WITH HER KNOWLEDGE AND CONSENT. — A building, necessary for the improvement of the separate estate of a wife, erected thereon under a contract made by her husband alone, but with her knowledge and consent, is subject to a mechanic's lien for materials reasonably necessary for its erection, furnished upon the order of the contractor, and used in the construction.

CLAIM OF MECHANIC'S LIEN FOR MATERIALS FOR DWELLING DOES NOT IDENTIFY RECOVERY FOR MATERIALS FOR STABLE. — Where materials are supplied by a material-man for a dwelling and a stable on the same lot of land, a claim for materials furnished for the dwelling, but not including the stable, will not authorize a recovery for the materials furnished for the stable, even though it is appurtenant to the dwelling, and necessary for the convenient enjoyment of the house and lot. And the mere mention of the stable, in the caption of the bill of particulars appended to the claim, is not a sufficient inclusion of the stable in the claim.

SUBCONTRACTOR CHARGEABLE WITH NOTICE OF TERMS OF ORIGINAL CONTRACT. — A subcontractor is chargeable with notice of all the terms and stipulations of the contract between the original contractor and the owner, and is bound by them, whether he had actual knowledge of them or not.

SCIRE FACIAS FOR MECHANIC'S LIEN. The opinion states the case.

F. G. Hobson and William H. Peace, for the appellants.

Irving P. Wanger and B. E. Chain, for the appellees.

STERRETT, J. The lien on which this *scire facias* issued was filed against a building described therein as "a dwelling-house, two stories high, with attic, the first story being of stone, and the second and attic being of frame, . . . erected on a certain lot situate in the township of Lower Marion, in said county, containing 1.899 acres of land, bounded by Thornbrook Avenue, lot No. 8," etc., and "being the same premises which William T. Tiers and wife, by deed dated May 17, 1887, . . . conveyed to the said Eleanor S. Thackara in fee." The building is further described by giving, somewhat in detail, its length, width, etc. The amount claimed is \$923.42, for lumber, lime, etc., furnished within six months last past, continuously, the particulars, items, amounts, dates, etc., being specifically set out in bill annexed and made part of this claim, and furnished for the erection of said building; said building having been erected

for the improvement of the separate estate of Eleanor S. Thackara, and by her direction, authority, and consent, and with the consent of her said husband, the said Alexander M. Thackara. The said materials were furnished under and in pursuance of a contract made by and between the said Eleanor S. Thackara and the said L. W. Kitzelman, and were reasonably necessary for the improvement of her separate estate, and said improvement is a necessary improvement. And due and legal notice of the amount and character of this claim was given said owner when the said materials were furnished and within ten days thereafter."

Appended to the claim is the bill of particulars, referred to therein as part of the claim. It is entitled as follows:—

"BILL OF PARTICULARS.

"July 20, 1888.

"L. W. Kitzelman, contractor; A. M. Thackara, owners, and wife.

"House and Stable near Rosemont, Pa.

"Bought of Walter Bevan and Brother."

It will be observed that neither in the body of the claim as filed, nor in the bill of particulars annexed thereto, except in the above-quoted caption, is there any mention made of "stable," or any other out-building appurtenant to the dwelling-house. While the location, dimensions, etc., of the latter are minutely stated in the body of the claim, there is nothing whatever said as to the stable. The only suggestion of any out-building is in the use of the word "stable" in the above caption.

It appeared that on July 15, 1887, Kitzelman contracted, in writing, with A. M. Thackara, husband of the other defendant, for the erection of the house on her lot, and on November 11, 1887, a similar contract was made with said husband for the erection of the stable on same lot. The plaintiffs furnished the materials specified in the bill of particulars, on the order of the contractor, and they were used partly in the construction of the house and partly in the stable. The building of the house was commenced in July, 1887, and completed about February 11, 1888. The stable was commenced in November, 1887, and finished about February 10, 1888. The plaintiffs had no knowledge that there were separate contracts for the erection of the respective buildings, nor that they were in writing; but they knew that Kitzelman was building both

the dwelling-house and the stable. These facts are either undisputed or established by the verdict.

Under the findings of the jury, the value of the materials furnished and used in both buildings, with interest, was \$999.68. They were reasonably necessary for the erection of the house and stable, and the buildings were necessary for the improvement of the wife's separate estate. The contracts were made and the materials were furnished with her knowledge and consent. The stable was appurtenant to the house, and was necessary for the convenient enjoyment of the house and lot.

One general ground of defense in the court below was, that, under the evidence, there could be no recovery for any part of the materials, mainly because the contracts were with the husband alone, and Mrs. Thackara, owner of the lot, was not a party thereto. The evidence tended to show that the contracts were made with the knowledge and consent of Mrs. Thackara; that the materials were reasonably necessary for the erection of the house and stable, and that those buildings were necessary for the improvement of her separate estate; that said materials were furnished and used in the erection of both buildings, with the knowledge and assent of Mrs. Thackara, and that the stable was appurtenant to the house, and was necessary for the convenient use of the house and lot.

That evidence was properly submitted to the jury, with instructions that unless they found the facts as above stated, their verdict must be for the defendants. The verdict in favor of the plaintiffs therefore establishes those facts; and if there was nothing else in the case, the judgment thereon should be sustained. As was said in *Einstein v. Jamison*, 95 Pa. St. 403: "While courts should carefully protect married women in the enjoyment of their separate property, and not permit it to be unjustly charged with encumbrances, they should not be permitted to enhance the value of their property at the expense of innocent and confiding creditors. If the materials were furnished and used in the improvement of her property by her directions, or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials." To the same effect is *Forrester v. Preston*, 2 Pittsb. Rep. 298. In that case it was well said: "If this were the case of the erection of a building on the wife's separate estate without her

authority, the building would not be liable to a lien for the materials furnished for the contractor. But the building in this case was not erected without the consent of the wife, under a contract made with a stranger. It was erected under a contract made with the husband, and as the facts abundantly show, with the knowledge, approbation, and concurrence of the wife. It is true, the husband made the contract in his own name, but the building contracted for was, with the knowledge and concurrence of the wife, designed and erected for her; and therefore, in making the contract, the husband may be regarded in law as the agent of the wife, as much so, as if he had avowedly acted by her express authority." Several of the specifications of error are to the rulings and instructions of the court hearing on the defense above stated. It is unnecessary to consider them in detail. There appears to be no substantial error in either of them.

Another ground of defense was, that, under the claim as filed, the plaintiffs could not, in any event, recover more than the value of the materials shown to have been furnished for and used in the construction of the dwelling. The court was accordingly requested, in defendant's third and fourth points, to instruct the jury, as matter of law, "that any materials which were used in the construction of the stable cannot be recovered in this proceeding"; that, in any event, the verdict "can only be for the amount and value of the materials which were actually used and applied in the construction of the dwelling-house." These points were refused *pro forma*, and the question of law raised by them was reserved for future consideration. The learned judge subsequently disposed of the question of law thus reserved, by refusing judgment *non obstante verdicto*, and entering judgment on the verdict for the amount found by the jury. This is the subject of complaint in the nineteenth and twentieth specifications.

C conceding the fact specially found by the jury, "that the stable was appurtenant to the house, and necessary for the convenient enjoyment of the house and lot"; and further, that the plaintiffs were entitled to a joint lien against both buildings, without being required to apportion the amount between them, — they should have included the stable in their claim. As we have seen, the stable is entirely ignored in the body of the claim. It is not even referred to as an "appurtenant" to the house; nor is it anywhere stated that any part of the

materials were furnished for or used in the construction of the stable. In *Bartley's Appeal*, 10 Pa. St. 495, it was held that a claim under the mechanic's lien law must set forth the nature of the work or materials, with such a specification of the building as will exclude work done or materials supplied for anything else; and hence "a claim for work and labor done to a house [describing it] . . . for or about the erection and construction of the said building and appurtenances is not sufficiently certain." In *Lauman's Appeal*, 8 Pa. St. 473, the claim was filed against a mansion-house, barn, wagon-house, etc., on a farm to which they were all appurtenant, and intended to be occupied and used together. It was held that, under the circumstances, an apportionment of the claim among the several buildings was unnecessary.

The plaintiffs, doubtless, had a right to include the stable in their claim, but it was not sufficiently done. The mere mention of the word "stable" in the caption of the bill of particulars cannot be regarded as an inclusion of the building in the claim. Conceding that the lien against the house and ground upon which it stands, and so much other ground as is necessary for the ordinary and useful purposes of the house, embraces the entire lot of nearly two acres, and that a sale on that lien would carry the lot and all the improvements thereon, including the stable, it does not follow that the plaintiffs have a right to include in the lien against the house the value of the materials furnished for and used in the construction of the stable; not included in the claim as filed.

The facts found by the jury, that plaintiffs had no knowledge of the separate contracts for the erection of the respective buildings, nor that the contracts were in writing, can have no bearing in their favor. They might have known, and it was their duty to ascertain, the fact. "It is the duty of one who deals with an alleged contractor to know the relation he bears to the owner; and, failing in this, he furnishes material at his peril": *Brown v. Cowan*, 110 Pa. St. 588. In *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, this court held that the subcontractor is chargeable with notice of all the terms and stipulations between the original contractor and the owner.

It follows from what has been said that the plaintiffs were not entitled to recover, in this suit, for the value of the materials furnished by them for the stable, and used in the construction thereof, and that the defendants' third and fourth

points for charge should have been affirmed, or else the question of law presented by those points should have been decided in favor of the defendants. The record furnishes no *data* by which a final judgment can now be entered, and it is therefore necessary to reverse the judgment and order a new trial.

Judgment reversed, and a *venire facias de novo* awarded.

MECHANIC'S LIEN ON WIFE'S SEPARATE ESTATE UNDER A CONTRACT SIGNED BY THE HUSBAND ALONE: See *Bodey v. Thackara*, 143 Pa. St. 171; ante, p. 526.

MECHANIC'S LIEN — SUBCONTRACTOR. — The subcontractor is charged with knowledge of all the terms and stipulations of the original contract between the owner and the principal contractor, and is bound thereby: *Schroeder v. Galland*, 124 Pa. St. 277; 19 Am. St. Rep. 691, and note; *Benedict v. Hood*, 124 Pa. St. 289; 19 Am. St. Rep. 698, and note 699, 700.

MECHANIC'S LIEN. — As to whether a particular building must be contemplated by the contract, see note to *Chapin v. Perce et al. Paper-works*, 79 Am. Dec. 273, 274.

ULRICH v. REINOEHL.

[143 PENNSYLVANIA STATE, 283.]

CREDITOR MAY LAWFULLY INSURE LIFE OF HIS DEBTOR. — A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life according to the Carlisle Tables.

INSURANCE OF DEBTOR'S LIFE NOT A WAGER WHEN. — Where a creditor, in good faith, and upon the entreaty of his debtor, insures the latter, a healthy man of forty-two years of age, in the sum of three thousand dollars, to protect a debt of one hundred dollars, and the evidence shows that if such debtor had lived out his expectancy, the creditor would have been a loser by a considerable sum, such insurance cannot be regarded as a wagering transaction.

EVIDENCE ADMISSIBLE TO SHOW WHETHER INSURANCE OF DEBTOR DISPROPORTIONED TO DEBT. — In order to determine whether an insurance by a creditor upon the life of his debtor is disproportioned to the debt or not, evidence of such debtor's age, of his expectancy of life, and of the cost of maintaining the policy during that period, is not only proper, but essential. And these facts, when put in evidence, are sufficient to carry the case to the jury.

SLIGHT MISTAKE IN ASSESSMENT INSURANCE WILL NOT VITIATE. — Although the precise amount of the assessments necessary to maintain an assessment insurance cannot be ascertained, yet it can be approximated, and where a creditor, in good faith, takes out such a policy on the life of his debtor, a slight mistake in calculating that amount will not vitiate the policy.

ASSUMPSIT. The opinion states the case.

Grant Weidman and A. Stanley Ulrich, for the appellant.

W. M. Derr and F. E. Meily, for the appellees.

PAXSON, C. J. This case is not free from difficulty. It has been twice argued, and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely. The facts are substantially as follows: The defendants are doing a firm business at Lebanon, Pennsylvania, and held a judgment against one Andrew Bleistine in the court of common pleas of Lebanon County, which, with interest and costs, amounted to \$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors, who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some manner. Not having the money, he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties and his wife's tears to save their home. The evidence shows that Bleistine offered them an insurance of three thousand dollars, or five thousand, or ten thousand, or any amount they wanted. The negotiation resulted in the defendants taking a policy of three thousand dollars on the life of Bleistine in the United Brethren Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary, and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute, and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death, the insurance money was paid by the company to the defendants. Subsequently, this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest, and premiums paid, the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction, within the

doctrine of *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, and the cases following it.

We may safely assume that the debt due by Bleistine to the defendants was *bona fide*; that so far from the latter having procured the former to insure his life for their benefit for a speculative purpose, they entered into it with reluctance, at the earnest request of Bleistine and his wife, to relieve them from financial embarrassment and to save their home. This takes out of the case the controlling element which existed in *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, and that line of cases. Yet if the defendants, even for an honest purpose, have transgressed the law, and made this a gambling transaction, they must suffer the penalty for such violation.

The first and second assignments present the main question in the case. Upon the trial below, the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was forty-two years of age, and that his expectation of life, according to the Carlisle Tables, was twenty-six years; that had he lived that length of time, the interest on the judgment, with the annual dues and assessments, and interest thereon, would have amounted to \$4,336.31, being \$1,336.31 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment.

In the second assignment, complaint is made that the learned judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount allowed and paid as the consideration of the transfer of the insurance, to wit, the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs, was grossly inadequate; and the disproportion between that amount and the amount of the insurance — three thousand dollars — is so great as to require the court to say as matter of law that the transaction was a wager, and that in this action Reinoehl and Neily have no right to retain more of the insurance money received by them than the amount of their satisfied judgment, with interest and costs, and the premiums and assessments paid by them, with interest thereon; and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the

amount of the judgment, interest and costs, and assessments and premiums paid, with interest."

This point was refused.

Whether the question of excess of insurance is to be disposed of by the court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule. We have none now. I felt the importance of this in delivering the opinion of the court in *Grant v. Kline*, 115 Pa. St. 618, where I said: "Speaking for myself it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest and the amount of premiums, with interest thereon, during the expectancy of life as shown by the Carlisle Tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123, our brother Sterrett, after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123. In that case there was an insurance of three thousand dollars to cover a debt of one hundred dollars, and this court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of three thousand dollars and the debt of one hundred dollars was so great as to require him to say as matter of law that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid, and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law."

We have no doubt that in a proper case, where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus in *Grant v. Kline*, 115 Pa. St. 618, it was said: "To take out a policy of five thousand dollars to secure a debt of five dollars would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true, this remark was made by way of illustration, and we only refer to it for that purpose now. *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123, decided nothing but that particular lit-

gation. It laid down no rule for the future beyond its own particular facts, viz., that an insurance of three thousand dollars for a debt of one hundred dollars, unexplained, was a gambling policy. It may be asked why it does not rule this case, where the amount of insurance was the same, and a difference of a few dollars only in the amount of the debt. The answer is not difficult. *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123, was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained or shown to be justifiable. This appears by the report of the case, as well as from the opinion of Judge McPherson, who tried that as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said, in reference to *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life, or the probable amount of annual payments to be made. Here, however, these important matters were proved, urged as a principal ground of defense, and required consideration. In our opinion, they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of forty-two years in the sum of three thousand dollars to protect a debt of one hundred dollars. If he had merely lived out his expectancy, and no longer, they would have been obliged to pay for assessments and annual dues \$2,436.32, to which, if interest be added, the amount of their investment would have been \$4,336.31. In return, they would have received three thousand dollars, thus suffering a considerable loss. Surely, to call such a transaction speculative is to misuse the word. That it happened to be profitable because the insured died within a few years is manifestly not to the point." I have quoted this extract at length, because I could in no better way emphasize the distinction between *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123, and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance; of all the forms of gambling it is one of the most objectionable. The records of our own courts show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest, either of a social or pecuniary nature, has a strong interest in the death of the assured. This interest grows and strengthens with each pay-

ment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what in his morbid fancy he may regard as his rights. That crime follows, in some instances, is a fact of which we have judicial knowledge.

All life insurance is in one sense speculative. Yet within proper restrictions it has been found to be highly beneficent, and not in conflict with public policy. It enables a man, in the days of his early struggles, to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means, and the only means, by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured, and resort to crime to procure it, but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest, either as a creditor or a relative, in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule, and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, 20 Week. Not. Cas. 123, as before observed, it was said the insurance was too large; in *Grant v. Kline*, 115 Pa. St. 618, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of

in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt, it is impossible for either a court or a jury to arrive at a correct result.

Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that if my debtor owes me one thousand dollars, a policy for one thousand dollars would be inadequate; for if my debtor dies within twenty-four hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment, then, would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what success? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man of twenty-five years of age and one of seventy-five is clear to the dullest understanding. The assured was only forty-two years of age, and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Garhale Tables were prepared with care by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out of his expectancy, in which case there would be the loss of interest on the debt for twenty-six years, added to the dues and assessments, with interest thereon, for the same period. The evidence shows that, in such event, the defendants would have been losers by a considerable sum. In fact, I infer from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance, the assured may live many

years beyond his expectancy, which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risks with the chances fairly balanced. Had these defendants taken out one hundred policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case, there would not have been material gain or loss.

Had the assured lived out his expectancy of life, no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not then have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results, or the accident of death. If not lawful in its inception, it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance, with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential to an intelligent understanding of the case. It is just what was lacking in *Grant v. Kline*, 115 Pa. St. 618, and was one of the reasons why we avoided deciding the broad question in that case. But any one who reads that opinion between the lines can see that the judicial mind must have been influenced, to some extent, by the suggestion in reference to the Carlisle Tables.

The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not produce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case, otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial: "With much respect it is suggested that the principle indicated in *Grant v. Kline*, 115 Pa. St. 625, and *Cooper v.*

Shaffer, 20 Week. Not. Cas. 123, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual (monthly?) assessments, and where, therefore, allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy, and thus entailing a loss upon the creditor. If we go beyond the expectancy, where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year, would be a retrograde step in our decisions. Under such a system the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death; whereas, at present, as I have endeavored to show, the risk of a debtor exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot, of course, be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments, even in a mutual company, can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it. And where a policy has been taken out in

good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance, by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof.

It may be that few men would take out a life policy to secure a debt of one hundred dollars, where there is an expectancy of life for twenty-six years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts; we only consider their legality. And care must be taken in the enforcement of an admittedly sound rule of public policy, not to impinge upon the right of the citizen to contract. In this instance, the contract was lawful, and the defendants appear to have entered into it, not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results, but by its surroundings at the time it was made.

We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt with interest, and the cost of such insurance with interest thereon, during the period of the expectancy of life of the assured according to the Carlisle Tables. We find no error in the ruling of the court below.

Judgment affirmed.

INSURANCE — INSURABLE INTEREST — DEBTOR AND CREDITOR. — A creditor may take and hold a policy of insurance on the life of his debtor to the extent of the debt, and such a policy is not a wager policy: *Equitable etc. Ins. Co. v. Hanswood*, 75 Tex. 333; 16 Am. St. Rep. 803; *Amick v. Butler*, 111 Ind. 573; 60 Am. Rep. 722, and note; extended note to *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 130. A policy of insurance taken out by a creditor on the life of a debtor is valid: *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245; *Schenfeld v. Turner*, 75 Tex. 324; *Walker v. Larkin*, 127 Ind. 100.

LILLIBRIDGE v. LACKAWANNA COAL COMPANY.

[148 PENNSYLVANIA STATE, 292.]

SURFACE OF LAND AND MINERALS BENEATH IT DISSEVERABLE IN TITLE. —

The surface of land and the minerals beneath it may be dissevered in title and become separate tenements. The mineral, when properly severed from the surface, becomes a separate corporeal hereditament, and its ownership is attended with all the attributes and incidents peculiar to the ownership of land.

INSTRUMENT CREATES FEE-SIMPLE ESTATE IN COAL BENEATH SURFACE OF

LAND WHEN. — An instrument which grants, demises, leases, and to mine-lets to a party all the merchantable coal under a certain tract of land, together with the sole and exclusive right to mine and remove the same, to have and to hold the coal until the exhaustion thereof under the terms of the indenture, creates in him an estate in fee-simple to the coal.

CHAMBER CUT THROUGH COAL IN MINE BELONGS TO OWNER OF COAL. —

The chamber or passage formed by mining coal is the property of the owner of the coal; and where the ownership of the surface of the land has been severed from the ownership of the coal, the owner of the surface cannot restrain the owner of the coal from making such use of such chamber as he may see fit, so long as such use does not injure the former. The right to use such chamber is exclusively in the owner of the coal, and cannot be questioned by the owner of the surface.

TITLE BY EXCEPTION OUT OF GRANT NOT ESSENTIALLY DIFFERENT FROM

TITLE BY DIRECT GRANT OF SAME SUBJECT. — There is no substantial difference between a title by exception out of a grant and a title by direct grant of the same subject. A grant of all the coal under a tract of land is an absolute conveyance in fee-simple of all the coal, and no greater title than that can be acquired by an exception to the same effect in a grant of the surface.

BILL for an injunction. The bill was demurred to for want of equity, and the demurrer was sustained, and the bill dismissed, with costs. Other facts are stated in the opinion.

Gerrick M. Harding and John S. Harding, for the appellants.

Henry A. Knapp and Everett Warren, for the appellee.

GREEN, J. It is not at all questioned, but is expressly conceded by the learned counsel for the appellants, that the agreement between these parties is an absolute sale to the defendant of all the merchantable coal underlying the tract of land in question, and that the surface of the land and the minerals beneath it may be dissevered in title and become separate tenements. This doctrine has been so frequently decided by this court, and in such varying circumstances, that a mere reference to some of the leading cases will be all that is necessary for the present occasion: *Caldwell v. Fulton*,

31 Pa. St. 475; 72 Am. Dec. 760; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Scranton v. Phillips*, 94 Pa. St. 15; *Sanderson v. Scranton City*, 105 Pa. St. 469; *Delaware etc. R. R. Co. v. Sanderson*, 109 Pa. St. 583; 58 Am. Rep. 743.

In the opinions delivered in the foregoing and other cases, we have emphatically decided that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land. We have held the mineral to be a corporeal, and not an incorporeal, hereditment; that the surface may be held in fee by one person, and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land, when owned by a different person; that possession of the mineral may be recovered by ejectment, and title to it may be acquired by adverse possession under the statute of limitations, though not by prescription, because it is not an incorporeal right. In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land to all intents and purposes. Said Strong, J., in *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760: "Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. It is not denied, in such a case, that both are land-owners, both holders of a corporeal hereditament." Woodward, J., in *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436, said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed duly acknowledged and recorded, than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance."

In the litigated causes, the contentions have been rather upon the interpretation and legal effect of the instruments under which the questions have arisen, than upon the doctrine itself. No such contention arises here, as counsel have very candidly conceded what was indeed inevitable, that the instrument between the present parties came clearly within the adjudged cases, and created an estate in fee-simple in the defendant in the coal underlying the plaintiffs' surface. It includes "all the merchantable coal" under the surface.

"with the sole and exclusive right to mine and remove the same," and with this *habendum*: "To have and to hold the coal in and under said land, unto the said party of the second part, its successors or assigns, until the exhaustion thereof, under the terms of this indenture."

It is not possible that there can be any question that this is an absolute grant in fee-simple of all the coal under the surface of the tract. But it is contended with great earnestness and ability by the learned counsel for the appellants that nothing more than the coal passed to the defendant under the agreement, and as to the chamber or space left by the removal of the coal under the mining operations of the defendant, the plaintiffs were still owners in fee, or reversioners, with a right which could not be invaded by the defendant, except for the purpose of removing the coal that underlaid the surface. This brings us to consider the precise character of the present proceeding, and the particular question that arises under it.

The proceeding is a bill in equity to restrain the defendant from removing coal belonging to them on another tract adjoining this tract on the north, by moving the same through a tunnel or way made by the defendant through one of the underlying veins of coal across the tract to the other land of the defendant, two hundred feet below the surface, of considerable breadth, and twelve feet in height. It is alleged in the bill that this way was produced by the mining operations of the defendant in accordance with the contract, and that the defendant, having acquired the adjoining property after the agreement with the plaintiffs was made, have been and are taking out coal from the adjoining tract through and over this tunnel or way; and this is claimed to be an illegal use of the plaintiffs' property, which they asked to have restrained. The argument is, that it was not within the intention of the parties that such a right should be granted or exercised, and that, whether it was or not, the plaintiffs have such a property in the chamber or space left by the mining operations that it cannot be used without their permission.

There is nothing in the instrument or in the circumstances surrounding it which can give any force to the argument from intention. We cannot know what was the intention of the parties except from the terms of their contract. The defendant demurred to the bill for want of equity. No testi-

mony of any kind has been taken. The bill makes no averment of any intention of either of the parties, but simply sets out the contract and the acts of the defendant in executing its terms. Of course there are no surrounding facts that we can consider. There are none in the bill except such as are subsequent to the contract, and these amount only to an allegation of the subsequently acquired interest of the defendant in the adjoining property, and the removal of coal therefrom through the way made by the removal of the coal under the tract.

The proposition that the plaintiffs have a fee in the chamber or space left by the removal of the coal, antagonistic to the right of the defendant to use it, is a novel one. No authority is cited to support it, and it seems quite incongruous with the admitted ownership and estate of the defendant in the coal displaced. Under all the decisions, the coal in place was absolutely owned in fee-simple by the defendant. In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee-simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760, how can the law regard the space which the substance occupies as other than the substance itself? Of course such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellants' argument. It could not be otherwise. Certainly, if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil above. We said in *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760: "It is a common thing, in the mineral districts of Pennsylvania, for the surface to belong to one owner, and the coal which it covers to another. Both the surface and the coal are held by deeds, executed and delivered and recorded

in the same manner; and there is no more reason for considering the coal an incorporeal hereditament, because it has not been opened, than there is for considering the soil such because it has not been plowed. Still less reason is there for calling it an incorporeal hereditament, if the deed happen to describe the grant as a right to enter, dig, and carry away all the coal, instead of describing the coal without the customary circumlocution. In all these cases, where the right, rather than the thing, is described, nobody is at a loss to know what is intended to pass. It is the thing that is bought and sold. And where that is a coal-bed, it is an abuse of language, and an unnecessary application of legal distinctions, to call it an incorporeal hereditament." If, then, the coal in place is a pure corporeal hereditament, the title in fee-simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases.

By the necessity of the case the appellants argue that the defendant's right in the chamber or way is only an easement, and then cite authorities that an easement can only be exercised to the extent of the grant. But, as we have already seen, this is in direct hostility to all the authorities on that subject. If the subject be further considered upon principle, it will be found difficult to understand that any property right of the appellants is invaded by the action of the defendant. According to the averments of the bill, the tunnel or way is cut through a vein of coal, two hundred feet below the surface, and is twelve feet high, and extends in the vein all the way from the one side to the other of the tract. In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it, they cannot use it; they are in no manner obstructed or injured by it. Nor can we understand how they are or can be injured in any other way. It is of no avail to say generally, in the bill, that they are injured. The injury must be stated specifically, so that a court may know what it is. This is not done, and we know not what the injury complained of is. How, then, can we enjoin the defendant? We are asked to enjoin against the removal of coal from the adjoining tract, but this is a

matter with which the plaintiffs have no concern. They do not pretend to have any title or interest in that coal. They ask to enjoin removing that coal through the chamber or way made by the defendant through its own property, to wit, the coal sold to them by the plaintiffs. Why or for what reason should we do this? The plaintiffs would gain nothing which they do not now have, if we did. No complaint is made in the plaintiffs' bill of either the deprivation or injury of any right growing out of the contract. The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant, and that use is not and cannot be questioned by the plaintiffs. It is not alleged that the defendant has failed to perform any duty imposed upon it by the contract. We are bound to assume, therefore, that all the coal which the defendant agreed to take out or pay for each year has been taken out or paid for. In no circumstances would the case be a proper one for an injunction.

But, upon the authorities, the case is entirely with the defendant. The question has arisen in several cases in the British courts, and the right of the owner of the coal to use the tunnel or way to carry other coal through it than that underlying the land of the surface owner has always been affirmed. The subject is thus presented in MacSwinney on Mines, 67: "The owner in fee simple or tail of lands containing mines or quarries has an absolute right to use them, and the chamber which incloses them, and the space or shell which the working of the minerals creates, and the subsoil generally, in any manner which he thinks proper. And where the owner in fee-simple of lands grants them, excepting the underlying mines, he has, with respect to those mines, a similar right. And as, by excepting the mines, he *ipso facto* excepts the chamber which incloses them, he has a similar right with respect to that chamber, and with respect to the space or shell which the working of the minerals creates. The containing-chamber is not purely and solely a species of property which can only be made profitable by the removal of the inclosed minerals, with the incidental rights of using all proper means for obtaining them. It is a species of property which is as free as other property from restrictions as to its mode of use. The grantor may therefore use the space or shell created by his previous working of the inclosed minerals, as a thorough-

fare for the carriage of minerals gotten out of his adjoining land. And if, instead of working the inclosed minerals and then utilizing the space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and to accordingly use it as a thoroughfare for the carriage of other minerals, he is entitled to do so."

In *Hamilton v. Graham*, L. R. 2 Sc. & Div. App. 166, there was an exception in a free charter, in favor of the Duke of Hamilton and his heirs, of all the coal and limestone within the lands granted. He was the owner of three estates, Clydesmill, Cambuslang, and Morristown; and one Graham had become the owner of the surface of Cambuslang. The duke leased the coal in Clydesmill and a portion of the coal under Mr. Graham's surface in Cambuslang, and his lessees at once made use of a passage-way through the coal underlying Mr. Graham's surface, for the conveyance of other coal and limestone mined from the estates of Clydesmill and Morristown, and this coal and limestone the duke owned by virtue of the reservation or exception out of the grant of the surface. Mr. Graham brought an action to stop the further use of the passage, but it was held on appeal to the house of lords that this was a rightful use of the passage. Lord Westbury, delivering his opinion, said: "You may approach it laterally from another estate, for the purpose of mining the minerals. You may use the strata which you have reserved to yourself, or rather declared to remain in yourself, in any manner consistent with ownership. You may traverse it from any adjoining land you have. You may create a road or tunnel through it; and you may, through that road or tunnel, carry either the minerals or any other proceeds of an adjoining estate. You therefore have, for there is nothing to restrain you, the same universal right and unlimited power of enjoyment of the estate that remains in you, as you had antecedently to the grant of the *dominium utile*, the enjoyment of which that grant of the *dominium utile* in no respect impairs or affects." Lord Colonsay, in the same case, said: "It is a great mistake to say that the duke has no right to use these minerals except for the purpose of bringing them to the surface. He may use them in the way which is most beneficial to himself. . . . There is no doubt that the Duke of Hamilton was not entitled to increase the burdens of the servitude on the surface by bringing the minerals from the other property over the surface. The surface was the servient

tenement, and the minerals under that tenement were the dominant tenement in regard to that particular right of servitude. But the principle does not apply in regard to the right of property; and to say that he is carrying the minerals through the property of the pursuer is another mistake. He is carrying them through his own property, and not through the property of the pursuer at all. There is a want of keeping in view the distinction between the right of property and the right of servitude here, which seems to me to have led to an erroneous judgment in the case. I conceive that so long as there is any of the mineral property which the Duke of Hamilton has, he is entitled to use any of that property in the mode which is most beneficial to himself." The lord chancellor also said, referring to his opinion in the case of *Proud v. Bates*, 34 L. J. Ch. 406, "As to the excepted mines I held that the owner had an absolute right to do as he pleased with them, and that he therefore had a right to carry his coals through them."

In this last-mentioned case of *Proud v. Bates*, 34 L. J. Ch. 406, a lease was made of the waste land of the manor, with an exception of the mines and quarries, with full power to mine and work the same. A way available for the carriage of minerals lay exclusively within the excepted mines, and the lord claimed the right to carry through this way minerals worked on other property than that embraced in the lease. The court held that he had an absolute right to do what he pleased with the excepted mine, and therefore he had a right to carry through them minerals from wherever gotten. Vice-Chancellor Wood, in delivering his opinion, said: "Now, whether the word 'mines' be used, as it often is, in the sense of minerals, the thing dug out of the mine, or that which contains the minerals, that which contains cannot be less than the thing contained; and therefore there is no doubt that the whole containing-chamber which has the minerals is 'the mine'; and so far as the mines are concerned, there can be no question that they are altogether out of the demise, and as to them, the representatives of the lessee are, of course, entitled to use them for any purpose whatever, and at any period. Lord Campbell's decision, in the cause of *Bowser v. Maclean*, 2 De Gex, F. & J. 415, in this court, completely explains what the right view is. He says: 'With regard to copyholds, the copyholder has the whole right in him, but subject to the right of the lord to work the mines; and the lord cannot use

an underground way for the purpose of passing through any portion of the copyhold premises. But as to that which is excepted out of a demise by contract, of course the owner can use whatever he excepts in any way he thinks fit." In *Eardley v. Granville*, L. R. 3 Ch. Div. 826, Jessel, M. R., says: "If a freeholder grants lands excepting mines, he severs his estate vertically; i. e., he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor." Referring to the case of *Hamilton v. Graham*, L. R. 2 Sc. & Div. App. 166, he said: "I decided that the same law applies to Scotland which applies to England. In a case like that, the word 'mines' meant subsoil containing the minerals, and not merely the minerals themselves."

The appellants reply to these cases by saying they were cases of exceptions out of grants, and the mines reserved or excepted were the property of the grantors, and never were conveyed; hence they held everything not granted by their original title. But the distinction is without force. There is no substantial difference between a title by exception out of a grant and a title by direct grant of the same subject. In a case of an exception, the grantor retains the whole title which he already holds; and in the case of a direct grant, the grantee holds the whole title granted, and the ownership is as absolute in the one case as in the other. We have held that a grant of all the coal underneath a tract of land is an absolute conveyance in fee-simple of all the coal, and no greater title than that could be acquired by an exception to the same effect in a grant of the surface. The books make no distinction.

Thus in 3 Washburn on Real Property, 432, it is said: "As an exception is the taking of something out of the thing granted, which would otherwise pass by the deed, it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor were made the grantee by the exception." In *Bowser v. Maclean*, 2 De Gex, F. & J. 415, the lord chancellor said: "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold leased land with a reservation of the minerals, or freehold land where the surface belongs to one owner and the subsoil containing minerals belongs to another, as separate tenements,

divided from each other vertically instead of laterally. If this had been such freehold land, the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil." In *Whitaker v. Brown*, 46 Pa. St. 197, we held that where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon-road to haul the coal therefrom as wanted," the saving clause operated as an exception of the coal, and therefore that the entire and perpetual property therein remained in the grantor. The whole reasoning of the opinion puts the case upon exactly the same footing as if the words of the exception had been contained in a specific grant of the coal, and *Caldwell v. Fulton*, 81 Pa. St. 476, 72 Am. Dec. 760, and kindred cases, were cited as authorities for the ruling. In *MacSwinney on Mines*, 68, the author says: "Similar principles apply where the owner grants it [the surface] by way of lease, excepting the mines, or where he grants the mines in fee-simple, and excepts the surface." In *Bainbridge on Mines and Minerals*, *34, the author says: "The severance of mines is usually effected by exceptions in deeds of assurance which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted, and in existence at the time of the grant; while the latter is a right of new creation arising out of the subject of the grant. They are different in legal effect, but in their creation 'there is no magic in words,' and if the meaning is clear, either of the above expressions will operate for the purpose designed. They are also construed exactly in the same way as actual grants. In either case, the law favors their construction by giving them all proper and necessary incidents."

There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed-rock underneath the vein; on the contrary, it is alleged that the tunnel has been cut through the coal, by which we understand it is in the very body or substance of the coal which was bought by the defendant. It follows, hence, that the tunnel or way is exclusively within the defendant's own property, and is subject to such use as any owner may desire of property belonging to himself. Upon the whole case, we think the disposition of it made by the learned court below was correct.

Judgment affirmed.

REAL PROPERTY — TITLE TO SURFACE AND MINERALS SEVERABLE. — Minerals unsevered from the soil form a separate corporeal hereditament, and constitute property capable of possession distinct from the surface: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368, and note; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Marvin v. Brewster etc. Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Benavides v. Hunt*, 79 Tex. 383; *Silva v. Rankin*, 60 Ga. 79.

GRANTS OF MINERALS RESERVING THE LAND OR OF LANDS RESERVING THE MINERALS, AND THE RIGHTS OF THE PARTIES THERETO. — Although the owner of land is presumed to own everything above and beneath its surface, it is well established in English and American law that the surface of land and the minerals underneath it may be dissevered, and become separate tenements. After severance has been effected, a distinct and separate estate of inheritance may be held by one person in the minerals under the surface, while another holds an estate in fee in the surface: *Blanchard and Weeks on Mines and Minerals*, 30; *Humphries v. Brogden*, 12 Q. B. 739; *Ridgill v. Brown*, 20 Ala. 412; 56 Am. Dec. 202; *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; *Knight v. Indiana etc. Co.*, 47 Ind. 105; *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. St. 284; *City of Scranton v. Phillips*, 94 Pa. St. 15; *Sanderson v. City of Scranton*, 105 Pa. St. 469; *Delaware etc. R. R. Co. v. Sanderson*, 109 Pa. St. 583; 58 Am. Rep. 743; *Massot v. Moses*, 3 S. C. 168; 16 Am. Rep. 697.

SEVERANCE OF MINERALS FROM SURFACE, HOW EFFECTED. — The severance of minerals from the surface of the land is usually effected by exceptions in the deeds which transfer the surface and reserve the minerals. But it may also be effected by a grant of the minerals alone. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while a reservation is a right arising out of the subject of the grant. But if the meaning is clear, either of these expressions will operate for the purpose designed. They are construed in the same way as actual grants, the law favoring their construction by giving them all proper and necessary incidents: *Bainbridge on Mines and Minerals*, 2d ed., 56. In *Whitaker v. Brown*, 46 Pa. St. 198, Woodward, J., who delivered the opinion of the court, referring to the words of a deed, said: "Although they were apt words to constitute a reservation, yet, so far as they affect the coal, they must operate as an exception, because the coal was a corporeal hereditament, *in esse* at the date of the deed, part of the land itself, and therefore not the subject of a reservation." Gordon, J., in delivering the opinion of the court in *Horner v. Watson*, 79 Pa. St. 242, 21 Am. Rep. 55, said: "A distinction has been attempted between a grant of the surface by the owner of the whole fee and a reservation thereof in his own favor as implied by the conveyance of the minerals alone. But this distinction is not sound." A reservation of minerals and mining rights is construed as is an actual grant thereof. It makes no difference whether the right to mine is conferred by an exception in a deed of the surface, or by a grant of the mine by the owner of the whole estate therein, reserving to himself the surface: *Marvin v. Brewster I. M. Co.*, 55 N. Y. 358; 14 Am. Rep. 322.

GRANT OF MINERALS, FORM OF. — There are two ways in which the subject of a conveyance may be described. One is by describing the thing itself, as land by metes and bounds, or by a known name; the other is by desig-

uating its usufruct, or the dominion over it. Thus a grant of the rents, issues, and profits of a tract of land is uniformly regarded as a grant of the land itself. The minerals under a tract of land may therefore be conveyed by naming them, or by granting the full right, title, and privilege of digging and taking away the minerals to any extent that the grantee may think proper. The giving of the right to mine and take away all the minerals amounts to a grant of the minerals themselves. No man can acquire any greater estate in minerals than the exclusive right in himself, his heirs and assigns, to mine and remove the whole of them. By the grant of such a right, the minerals become severed, and the title thereto becomes vested in the grantee. And the same holds true in case of a reservation or exception of such right in a conveyance of the surface by the owner of the entire estate: *Blanchard and Weeks on Mines and Minerals*, 31; *Duke of Hamilton v. Graham*, L. R. 2 Sc. & Div. App. 166; *Caldwell v. Fulton*, 31 Pa. St. 475; 72 Am. Dec. 760; *Whitaker v. Brown*, 46 Pa. St. 197; *Sanderson v. City of Scranton*, 105 Pa. St. 469; *Delaware etc. R. R. Co. v. Sanderson*, 109 Pa. St. 583; 58 Am. Rep. 743. The term "minerals," in a grant, includes *prima facie* every substance that can be got underneath the surface of the earth for profit. And where the terms "mines and minerals" are used in a grant or exception, the word "mines" will not, *prima facie*, be held to be the governing word, so as to restrict the meaning which would otherwise be attached to the word "minerals": *MacSwinney on Mines and Minerals*, 12; *Hext v. Gill*, L. R. 7 Ch. 699. The terms "mines and minerals" in a grant will pass paint-stone obtained by the ordinary means of mining, and found below the surface of the soil, and in strata distinct from the ordinary earth: *Hartwell v. Camman*, 10 N. J. Eq. 128; 64 Am. Dec. 448. And the term "minerals" includes china clay: *Hext v. Gill*, L. R. 7 Ch. 699.

RIGHTS INCIDENT TO GRANT OF MINERALS. — Every express grant or reservation of minerals or mineral rights in a tract of land by necessary implication passes to the grantee or reserves to the grantor certain incidental rights. The most important of these rights are: to open the mines by sinking shafts; to use such means as are necessary in getting out and removing the minerals; and generally to employ all the necessary appliances requisite to the proper working of the mines: *Bainbridge on Mines and Minerals*, 84; *Rosbotham v. Wilson*, 8 H. L. Cas. 348; *Proud v. Bates*, 34 L. J. Ch. 406; *Smith v. Darby*, L. R. 7 Q. B. 716; *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; *Ewing v. Sandoval C. & M. Co.*, 110 Ill. 290; *Marvin v. Brewster I. M. Co.*, 55 N. Y. 538; 14 Am. Rep. 322. The extent to which the grantee of the minerals under a tract of land may use the surface for the erection of buildings, ways, etc., is, of course, a question to be determined by the jury from the evidence in each particular case: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; *Marvin v. Brewster I. M. Co.*, 55 N. Y. 538; 14 Am. Rep. 322. But the owner or grantee of minerals, who does not own the surface, has no right to use the surface or the materials of the land for the purpose of changing the character of the minerals to which he is entitled, as for converting coal into coke, or clay into bricks, or for smelting metallic ores: *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368.

RIGHT OF OWNER OF SURFACE TO SUPPORT. — Where the ownership of the surface of a tract of land has become severed from the ownership of the minerals under it, unless the matter has been otherwise determined by contract, the owner of the surface has an absolute right to necessary support for his land. And if the owner of the minerals removes them entirely, so that

injury results from the subsidence of the soil, he will be liable for the damage resulting, however carefully or skillfully he may have conducted his mining operations. The owner of the minerals, in such a case, is entitled only to so much of them as he can get without injury to the superincumbent soil. He must either leave pillars or ribs of the mineral itself, or put in artificial supports sufficient to sustain the superincumbent soil: *Rogers on Mines and Minerals*, 469; *Blanchard and Weeks on Mines and Minerals*, 616; *Bainbridge on Mines and Minerals*, 434; *Harris v. Ryding*, 5 Mees. & W. 60; *Smart v. Morton*, 5 El. & B. 30; *Proud v. Bates*, 34 L. J. Ch. 406; *Dugdale v. Robertson*, 3 Kay & J. 395; *Humphries v. Brogden*, 12 Q. B. 739; *Hest v. Gill*, L. R. 7 Ch. 699; *Smith v. Darby*, L. R. 7 Q. B. 716; *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; *Yandes v. Wright*, 66 Ind. 319; 32 Am. Rep. 109; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369; 31 Am. Rep. 150; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322; *Ryckman v. Gullis*, 57 N. Y. 69; 15 Am. Rep. 464; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 365; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722; *Williams v. Hay*, 120 Pa. St. 485; 6 Am. St. Rep. 719. The mining right is servient to the extent of sufficient supports, and a custom to the contrary is not good: *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55. The absolute right to support for the surface is not taken away by mere implication from language not necessarily importing such a result: *Williams v. Hay*, 120 Pa. St. 485; 6 Am. St. Rep. 719. It was held in that case that the right to support was not taken away by a clause in the deed providing that the grantor should, in removing the minerals, "do as little damage to the surface as possible." And in *Livingston v. Moingona Coal Co.*, 49 Iowa, 369, 31 Am. Rep. 150; it was held that such right was not taken away by a clause in the deed reserving to the grantors the right to obtain and remove the minerals "by such means as they deem proper without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land." The term "surface," within the meaning of this rule, is not confined to the geometrical superficies merely, but includes whatever earth, soil, or land lies above the mine, and may include a mine above another mine: *Yandes v. Wright*, 66 Ind. 319; 32 Am. Rep. 109. Most of the cases relating to the right of vertical support are of comparatively recent date; and Lord Campbell, C. J., in delivering the opinion of the court in *Humphries v. Brogden*, 12 Q. B. 755, said: "We have attempted without success to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil divided horizontally belong as separate properties. This penury, where the subject of servitudes is so seriously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England."

RIGHT TO SURFACE SUPPORT MAY BE CONTROLLED BY CONTRACT. — Where minerals are granted or reserved, with power to work and get them given or reserved, in the most general terms, still, a reasonable support must be left for the surface, and there is in every such case a *prima facie* inference at common law that the grant or reservation is made in such a manner as is consistent with the retention of the right to support. But as every person has the right to do with his own property as he wishes, the owner of the surface may by a valid contract grant the right to remove all the minerals without leaving any supports: *Smith v. Darby*, L. R. 7 Q. B. 716; *Aspden*

v. Seddon, L. R. 10 Ch. 394; *Duke of Buccleuch v. Wakefield*, L. R. 4 Eng. & Ir. App. 377; reversing *Wakefield v. Duke of Buccleuch*, L. R. 4 Eq. 618; *Roughthorn v. Wilson*, 8 H. L. Cas. 348; *Humphries v. Brogden*, 5 El. & B. 30; *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *City of Scranton v. Phillips*, 94 Pa. St. 15. In the case of *Jones v. Wagner*, 66 Pa. St. 429, 5 Am. Rep. 385, Thompson, C. J., delivering the opinion of the court, said: "The upper and underground estates being several, they are governed by the same maxim which limits the use of property otherwise situated, *Sic utere tuo ut alienum non laedas*. . . . Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the mineral estate."

In *Aspden v. Seddon*, L. R. 10 Ch. 394, a piece of land was granted, upon which a cotton-mill was to be erected, the grantor reserving all mines and minerals under it, and the right to take the same, making compensation for the damages to be done to the cotton-mill. It was held that the grantor could not be restrained from working the mine and taking the minerals, although the buildings upon the surface would be necessarily injured by his so doing. In such cases, however, the reservation must be framed in such a way as to show clearly that it was the intention of the parties that the grantor should have the power to work the mines in such a way as to injure the surface: *Hext v. Gill*, L. R. 7 Ch. 699.

GRANTEE OF MINERALS NOT LIABLE FOR LOSS OF SPRINGS CAUSED BY HIS MINING. — The grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 388.

RIGHT OF GRANTEE OF MINERALS TO USE CHAMBER CUT THROUGH MINERAL. — The owner in fee of the minerals under a tract of land has the absolute right to use the chamber or space in which the minerals are inclosed in any manner he chooses: *MacSwinney on Mines*, 67; *Bowser v. Maclean*, 2 De Gex, F. & J. 420; *Proud v. Bates*, 34 L. J. Ch. 406; *Hamilton v. Graham*, L. R. 2 Sc. & Div. App. 166; *Eardley v. Granville*, L. R. 3 Ch. Div. 826; *Romney v. Blair*, L. R. 1 App. C. 701. We have been unable to find any American cases bearing upon this question, and the English cases are so fully considered by the court in the opinion in the principal case that a further discussion on this point is unnecessary.

KESLER'S ESTATE.

[148 PENNSYLVANIA STATE, 385.]

ANTENUPTIAL CONTRACT VALID AND CONCLUSIVE OF RIGHTS OF PARTIES WHEN. — Where an intended wife, of mature years, of sound mind, of good education, fully capable of protecting herself, under no restraint, and having every opportunity afforded her to inform herself as to the nature and character of the instrument, executes an antenuptial contract, by which, in consideration of the provision therein made for her, and on a full disclosure of all the facts as to the estate of her intended husband, she releases all her future interest in his estate, such contract must be considered as having embodied in it the real intention of the

parties, and to be conclusive of their rights. And the testimony of a single witness to the effect that such intended husband declared his intention to deceive his intended wife is not sufficient proof of fraud to avoid such contract.

AGREEMENT TO RENEW MARITAL RELATIONS FOR MONEY NOT VALID CONSIDERATION. — Where an intended wife enters into a valid and binding antenuptial contract, and after the marriage voluntarily leaves her husband solely because of her dissatisfaction with such contract, a promise thereupon made by the husband not to revoke a codicil to his will making additional provision for her, provided she should become reconciled with him, resume her marital relations, and abandon legal proceedings instituted by her for the revocation of the antenuptial contract, is without valid consideration, and the subsequent revocation by him of such codicil will not operate as a valid revocation of the antenuptial contract.

Account of Charles M. Lukens and Thomas M. Montgomery, executors of the will of Henry Kesler, deceased, was called for audit November 12, 1889. The testator died June 23, 1888, leaving a will dated May 18, 1883. The account showed a balance for distribution of \$184,376.96, one third of which was claimed by Mrs. Mary R. Kesler, as widow of the testator, electing to take against the will. The antenuptial contract referred to in the opinion was executed on the 6th of May, 1884, by Henry Kesler of the first part, Mary Rebecca Davidson of the second part, and Charles M. Lukens and Thomas M. Montgomery of the third part. The testator and the claimant were married on May 20, 1884. In a codicil to his will, dated October 6, 1884, the testator referred to the fact that after the date of the will he had married, and before his marriage had executed the antenuptial contract above referred to, which he confirmed; and as a further provision for his said wife, he bequeathed to her the sum of two thousand dollars, to be paid to her by his executors. By a second codicil, dated August 18, 1885, he revoked the marriage settlement, and bequeathed to his wife a full third part of his estate. In 1886, or early in 1887, Mrs. Kesler became estranged from the testator, because of her dissatisfaction with the antenuptial contract, and consulted counsel with a view to institute legal proceedings to annul the deed. On learning of his wife's intention, the testator invoked the aid of his son-in-law, Lawson C. Funk, who appears to have been the confidant of his domestic troubles, to secure a reconciliation. Funk's mediation resulted in the assurance and promise by the testator to his wife, that if she would become reconciled, and withdraw the threatened litigation, he would not destroy or alter in any

manner the codicil of 1885, without first informing her and Funk. The wife thereupon withdrew from her contemplated legal proceedings and continued upon amicable relations with him until his death. After the testator's death it was discovered that on the 28th of October, 1887, he had executed a third codicil, whereby he revoked the prior codicils, thus reinstating the provisions of the antenuptial contract. The testimony in relation to the fraud alleged to have been perpetrated upon Mrs. Kesler by the testator was given by Lawson C. Funk. He testified that the testator told him that he was having a paper prepared by Lukens and Montgomery to protect himself and his heirs, as his intended wife was a young widow, and he did not know what she might do; she might jump the traces. The testimony of this witness tended to show that Mr. Kesler intended to have Mrs. Davidson execute the deed under the belief that the provision made for her in it was to be independent of and in addition to her interest in his estate under the intestate laws; "that this would not interfere with her rights." The auditing judge admitted the claim of the widow to share in the estate as though the testator had died intestate, and as though no marriage settlement existed. Exceptions to this adjudication filed by Lukens and Montgomery, the trustees, and by their *cestuis que trustent*, were argued before the court in bank, which held that by reason of the failure of the testator to comply with the terms of his contract, the claimant should not be barred from asserting her claim to take against the will, notwithstanding the deed of antenuptial settlement, and that she was entitled to one third of the personal estate absolutely, as if her husband had died intestate. From a decree of distribution entered in accordance with the opinion, the exceptants appealed.

R. P. White and J. M. Pile, for the appellants.

John G. Johnson and Samuel P. Hanson, for the appellee.

STEBBETT, J. There is certainly no apparent reason why, situated as these parties were, the "law should regard with disfavor" the antenuptial agreement made by them. Mr. Kesler was advanced in years, had already accumulated a fortune, and had a family by a former marriage; while Mrs. Davidson was lifted out of poverty and comfortably provided for by it. Persons situated as they were do not usually act from mere impulse, or contract without consideration; and the court below has accordingly found that "every require-

ment of the law seems to have been complied with in the execution of this contract. A full disclosure was made to the intended wife, and every opportunity afforded her, either to obtain information as to the nature and character of the instrument she came prepared to execute, or object to its execution, if ignorant of its contents or deceived as to its purpose and object. She was not illiterate, but intelligent, and well educated. She was not young and inexperienced, but of mature years, and acquainted with marital duties and rights. She was a free agent, of sound mind, and fully capable of protecting herself. Nor was she under any restraint. The deed of settlement, although of great length, is in the usual form adopted by careful and accomplished conveyancers, and its preamble, in clear and perspicuous language easily comprehended by a person of even ordinary intelligence, specified the terms and objects of the agreement entered into between the parties. That it was understood by the claimant, we think there is no doubt. And from her necessitous circumstances it is not wholly improbable she was content, assured of the maintenance and comforts afforded by her future husband's wealth during his lifetime, and the secured annuity of six hundred dollars for her life after his death, to relinquish all further claim upon his estate.

It is impossible to understand how, consistently with these facts, Mr. Kesler can be found to have practiced a fraud upon his intended wife in the execution of this contract. In his senile garrulity he may have made statements to his son-in-law which had better have been left unsaid; but when brought face to face with his wife, he distinctly averred, and she did not deny, that she had never asked him any questions in regard to the agreement, and that he had made the settlement "to protect his family; that she might jump over the traces; that he fully intended if she proved a faithful, good wife, — he only had this to protect himself and his family, — if she proved to be what he thought she was, and what she had now turned out to be, he would have given her at the same time one third." But whatever may have been his original intention, in view of the findings of the court below, that Mrs. Davidson, knowing her rights, and fully informed of the situation, deliberately and in writing released all her interest in her deceased husband's estate in consideration of the provision made for her by this agreement, and was content, it is incredible that a fraud should have in fact been practiced on her. Even as-

suming that the facts are as claimed by her counsel, the quantum of proof adduced is not sufficient to modify the agreement; they were not proved by two witnesses or their equivalent: *Thomas v. Loose*, 114 Pa. St. 35.

The agreement must be considered as having embodied the real intention of the parties at its date, and therefore conclusive of their rights. Was there a valid revocation of it? It will be conceded that there must have been a meritorious or valuable consideration for such revocation: *Stickney v. Borman*, 2 Pa. St. 67; and it is very clear that neither of these existed here. The sole inducement was the doing of that which Mrs. Kesler was legally bound to do. She had voluntarily estranged herself from her husband, because of her dissatisfaction with the antenuptial contract; there is no pretense that she had any other cause of complaint. If, as has been shown, that was a valid and binding contract, the estrangement was without justification; it was a wanton abuse of the marital relation for mercenary purposes, and reconciliation was her duty. Public policy forbids that the performance of such duty may be made the subject of barter and sale. The law fixes and regulates the marital relation on public considerations, and will not allow the parties to discard and renew it for money. Thus in *Robert v. Frisby*, 38 Tex. 219, the supreme court held that the husband is not legally bound by a post-nuptial contract in which he hires his wife to live with him. The same principle was affirmed by the supreme court of Tennessee in *Copeland v. Boaz*, 9 Baxt. 223; 40 Am. Rep. 89. And Mr. Justice Allen, of the supreme judicial court of Massachusetts, well said: "It is as much against public policy to restore interrupted conjugal relations for money as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration": *Merrill v. Peaslee*, 146 Mass. 460; 4 Am. St. Rep. 334. There are no cases in conflict with this view decided by this court. It was not involved in *Burkholder's Appeal*, 105 Pa. St. 31, upon which the court below relied.

It is said that abandonment of the legal proceedings instituted by Mrs. Kesler for the revocation of the antenuptial contract was sufficient consideration. The answer to this is, that she was not prejudiced by that act; the question in-

volved there has been raised here, and has been shown to be without merit. Mrs. Kesler is therefore not in a position to claim the aid of a court of equity, and the decree of the court below must be reversed.

Decree reversed, with costs to be paid by the appellee, and record remitted, with instructions to distribute the fund in accordance with the foregoing opinion.

HUSBAND AND WIFE — ANTENUPTIAL CONTRACTS. — To render an antenuptial contract binding, the wife should have had a full disclosure of the value of her husband's property: *Neely's Appeal*, 124 Pa. St. 406; 10 Am. St. Rep. 594, and note. See also *Pierce v. Pierce*, 71 N. Y. 154; 27 Am. Rep. 22, and note 26-28; note to *Merritt v. Scott*, 50 Am. Dec. 371-375.

HUSBAND AND WIFE — CONTRACT TO RESPECT MARITAL OBLIGATIONS. — Contracts between husband and wife the consideration of which is an agreement to fulfill a pre-existing marital obligation is without consideration, and void: *Miller v. Miller*, 78 Iowa, 177; 16 Am. St. Rep. 431, and note. The consideration for a note is illegal when the note was given by a husband to a wife to induce her to discontinue divorce proceedings, and return to him, where they have been living apart, on account of his cruelty: *Merrill v. Peaslee*, 146 Mass. 460; 4 Am. St. Rep. 334, and note; *Copeland v. Boaz*, 9 Bart. 223; 40 Am. Rep. 89.

WEST PHILADELPHIA NATIONAL BANK v. FIELD.

[143 PENNSYLVANIA STATE, 473.]

NON-PRODUCTION OF PROMISSORY NOTE IN SUIT, WHAT SUFFICIENT EXCUSE FOR. — Where, in an action by an indorsee against the maker of a promissory note, the plaintiff shows that the indorser, to whom the note was surrendered by the plaintiff in exchange for another note, the name of the maker of which was forged, had fled the country on account of said forgery and others, this is a sufficient ground laid to excuse the non-production of the note, and to justify the admission of secondary evidence of its contents.

GENUINENESS OF SIGNATURE OF MAKER OF NOTE, WHAT SUFFICIENT EVIDENCE OF. — Where the maker of a promissory note, upon being inquired of concerning its genuineness, and after examining it tells the indorsee that it is all right, evidence of this fact is sufficient to warrant the jury in finding that his signature to the note is genuine.

INDEMNITY AGAINST LOST NOTE SUED ON SHOULD BE REQUIRED WHEN. — Where the maker of a note is sued thereon by an indorsee who has delivered it to an indorser thereof in exchange for a note forged by such indorser, who has fled the country, the defendant is entitled to protection against the possibility of the note turning up in the hands of an innocent holder for value; but the court can give such protection by restraining execution until such indemnity is given.

FORGED NOTE TAKEN IN EXCHANGE FOR GENUINE ONE NOT PAYMENT. — The surrender by an indorsee to an indorser of a genuine note in ex

change for a note forged by such indorser does not amount to a payment of the genuine note, nor extinguish the indorsee's right to recover against the maker thereof.

ASSUMPSIT. The opinion states the case.

John G. Johnson, for the appellant.

Richard P. White, George H. Earle, Jr., and Samuel B. Huey, for the appellee.

STERRETT, J. In the language of plaintiff's amended statement of claim, this suit was brought against the defendant, John Field, "to recover the sum of five thousand dollars, being the amount of a certain promissory note drawn by the defendant to the order of John and James Hunter, dated June 25, 1886, and payable four months after date at Fifty-fifth and Paschall streets, and indorsed by said John and James Hunter to the plaintiff." As an excuse for non-possession of said note and inability to file a copy of it, the plaintiff added the following averment, viz.: "The said note is not now in the possession of the plaintiff, because at its maturity James Hunter, as agent for and on behalf of the defendant and of John and James Hunter, offered to plaintiff in payment thereof a note for five thousand two hundred dollars, purporting to be drawn by James Long to the order of and indorsed by John and James Hunter. Believing the signature of James Long to said note [to be genuine], the plaintiff accepted said note in payment, and delivered to James Hunter, as agent for defendant, the said promissory note of defendant. Plaintiff afterwards discovered, and now avers, that the signature purporting to be that of James Long to the note so offered and received in payment was a forgery, and consequently the said note was void, and the plaintiff has not received from said defendant, or from any other person, payment of the whole or any part of the aforesaid promissory note of defendant."

On the trial, evidence was introduced by the plaintiff tending to prove, *inter alia*, the following facts: 1. That the note in suit was made by defendant for the accommodation of the payees, indorsed in their names, presented to plaintiff by James Hunter, discounted by it, and the proceeds paid to said James Hunter; 2. When the note in suit matured, it was taken up by James Hunter, who, in lieu of it, gave plaintiff a note for five thousand two hundred dollars, at four months from October 28, 1886, purporting to be made by James Long

to the order of and indorsed by John and James Hunter; and when that note matured, it was in like manner taken up by James Hunter, who, in lieu of it, gave another note for five thousand two hundred dollars, at four months from March 2, 1887, purporting to be made by said Long to the order of and indorsed by said John and James Hunter; 3. The notes aforesaid, purporting to be made by James Long, were forgeries, but at the same time they were respectively taken by the plaintiff it believed they were genuine; 4. The note in suit and the first-mentioned Long note passed, in the manner and under the circumstances above stated, from the plaintiff into the possession of James Hunter, who, having been accused of having committed other forgeries at or about the same dates, fled the country, and up to and at the time of trial his whereabouts were unknown to the plaintiff, and no part of either of the above-mentioned notes has ever been paid.

We think sufficient ground was laid to excuse the non-production of the note in suit, and justify the admission of secondary evidence of its contents, etc.

The evidence tending to prove that defendant made the note consisted of his own admissions made to the president and cashier of the plaintiff on several occasions. The latter testified, in substance, that ten days or two weeks before the note matured, defendant came into the bank, handed him a notice which had been addressed to place of payment, etc., and asked to see the note. It was handed to him. After looking at it and turning it over, he said, "That is all right." A few days afterwards, defendant and Mr. Lucas called in relation to forming a syndicate to buy up the indebtedness of John and James Hunter, etc. During the conversation, as they were about leaving, "I asked Mr. Field the question, I said: 'By the way, Mr. Field, that note that you came here and inspected, was the signature of that forged or good?' Mr. Field replied that that signature was all right, and that the note was all right." Dr. Hughes, president of the bank, testified that a week or two after James Hunter fled, Mr. Lucas and defendant "came to the bank, wanting us to join in a plan to pay the debts of Mr. Hunter; and before going out Mr. Park asked him if that note of his was all right, genuine. He replied that it was, after some hesitation." In short, the testimony was ample to warrant the jury in finding that the signature of the maker of the note in suit was genuine, and also that possession of it was fraudulently obtained by James

Hunter in the manner above stated; but the learned judge, being of opinion that the evidence was insufficient to justify a verdict in favor of plaintiff, ordered a judgment of nonsuit, and afterwards refused to take it off. In that we think there was error.

It is well settled that a peremptory nonsuit is in the nature of a demurrer to the plaintiff's evidence. If there is any evidence, beyond a mere *scintilla*, which alone would justify an inference of the disputed facts on which his right to recover depends, it must be submitted to the jury: *Hill v. National Trust Co.*, 108 Pa. St. 1; 56 Am. Rep. 189; *Abraham v. Mitchell*, 112 Pa. St. 230; 56 Am. Rep. 312. Upon a motion to nonsuit, the defendant is considered as admitting every fact which the evidence tends to prove, including such inferences of fact as a jury may lawfully draw from it: *Miller v. Bealer*, 100 Pa. St. 585; *McGrann v. Pittsburgh etc. R. R. Co.*, 111 Pa. St. 171; *Jones v. Bland*, 116 Pa. St. 190.

Conceding, what under the evidence can scarcely be doubted, that James Hunter procured the discounting of a genuine note, and when it matured, deceitfully and fraudulently paid, or rather pretended to pay, it with a forged note, and when that matured, undertook to pay it also with a similar forged note, and then fled the country, the fair inference would be that the evidence of his criminality would not be left within plaintiff's reach. But it is only necessary to say in regard to this and other questions of fact that the evidence was quite sufficient to require its submission to the jury.

As an innocent party to the transaction, the defendant is, of course, entitled to protection against the possibility of the note turning up in the hands of an innocent holder for value; but as was held in *Bisbing v. Graham*, 14 Pa. St. 16, 53 Am. Dec. 510, the court has ample power to restrain execution until such indemnity is given. In that case it was said: "That the defendant is entitled to indemnity, before he can be compelled to pay, I have no doubt; for it may be that the note was indorsed in blank by Graham, and is now in the hands of a holder for value. . . . The maker ought not to encounter any risk, as he is in no default. The inconvenience, if any, is one to which the holder has exposed himself, arising, perhaps, from his own carelessness. . . . In this, all the authorities to which I refer generally agree. But the question recurs, Is the failure to indemnify in bar of the action? or is it a prerequisite merely to the execution to enforce pay-

ment of the judgment? In the absence of all direct authority, in this state at least, I incline to the latter view of the case. However the law may be as to suit brought to recover on a lost note (and I see no reason why there should be any difference), we are of opinion that when the note is lost after the commencement of the action, it is no objection to the rendition of judgment. Justice may be effectually administered by restraining the plaintiff from issuing his execution, without proper indemnity be given. This is an equitable power vested in the courts, which will take care to do equity, having a proper regard to all the circumstances of each case." To the same effect is *Bigler v. Keller*, 8 Week. Not. Cas. 323.

It is unnecessary to discuss so plain a proposition as that the plaintiff bank did not lose its right to recover on the note in suit because it was surrendered in exchange for a forged note. If authority for that be needed, it will be found in *Ritter v. Singmaster*, 73 Pa. St. 400; *Mount v. Scholes*, 120 Ill. 394; *Clift v. Moses*, 112 N. Y. 426. In the first-cited case, it was held that the trial judge correctly instructed the jury that "the receiving of notes whose indorsements were forged will not amount to a payment of a genuine note, or extinguish the right of action against the defendants as indorsers upon the first note, if the first note, drawn by Burkholder, and indorsed by defendants, bears their genuine signatures."

Further elaboration is unnecessary. For reasons suggested, we think the learned court erred in not taking off the judgment of nonsuit.

Judgment reversed, and *procendendo* awarded.

BILLS AND NOTES. — ACTIONS ON LOST OR DESTROYED NOTES: See note to *Blauie v. Noland*, 27 Am. Dec. 128, 129; note to *Edwards v. McKee*, 13 Am. Dec. 480-483; in both of which notes will be found discussions as to when indemnity against the lost note sued on will be required. As to the necessity of indemnity in such actions, see *Randolph v. Harris*, 28 Cal. 561; 87 Am. Dec. 139, and note; *Mackey v. Mackey*, 16 Col. 134.

PAYMENT — FORGED NOTE. — Payment in forged paper leaves the original debt in full force and effect: *Bank v. Buchanan*, 87 Tenn. 32; 10 Am. St. Rep. 617, and note. The receipt of a new promissory note, a signature to which is found to be a forgery, does not operate as payment of the original note or an extinguishment of the right of action thereon: *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281; *Allen v. Sharp*, 37 Ind. 67; 10 Am. Rep. 80; and to the same effect, substantially, is *Springer v. Hubbard*, 82 Me. 299; *Golfrey v. Crisler*, 121 Ind. 203; *Stratton v. McMakin*, 84 Ky. 641; 4 Am. St. Rep. 215.

ORNE v. FRIDENBERG.

[148 PENNSYLVANIA STATE, 487.]

RIGHT TO MANDATORY INJUNCTION LOST BY GROSS LACHES. — A chancellor does not interfere by way of mandatory injunction, even though the injury is clearly established, where there has been long-continued delay in asserting the right, and a remedy exists at law. A mandatory injunction to restrain the maintenance of buildings upon an adjoining lot, in violation of restrictive covenants in a conveyance thereof, will not, therefore, be granted, where all the buildings complained of have been for many years in full view of the party applying for the injunction. But although he is not entitled to an injunction in such a case, he may still sue at law, and recover damages, if he can show that he has sustained any.

CHANGE OF CIRCUMSTANCES AND SURROUNDINGS MAY JUSTIFY REFUSAL TO RESTRAIN VIOLATIONS OF BUILDING RESTRICTIONS. — An entire change of circumstances and surroundings in the neighborhood of the property, and in the character of the improvements and the purposes to which they are applied, are, it seems, sufficient to justify a chancellor in refusing an injunction to restrain violations of building restrictions.

BILL for an injunction. The opinion states the case.

F. Carroll Brewster and John G. Johnson, for the appellants.

George L. Crawford and George M. Dallas, for the appellee.

PAXSON, J. This was a bill filed in the court below to restrain the defendants, who are the appellants here, from continuing to maintain certain erections on the premises 908 Chestnut Street, Philadelphia, upon the ground that they were erected in violation of certain building restrictions imposed upon said property by Edward Shippen Burd, when he sold and conveyed it to Thomas C. Rockhill in 1825. The title to the adjoining or Burd property has been vested by numerous mesne conveyances in the plaintiff, and the Rockhill property is now owned by the appellants as testamentary trustees.

The three principal matters complained of in the bill are: 1. A stable and coach-house on Sansom Street; 2. A bulk-window on Chestnut Street; and 3. Two frame buildings between the Chestnut Street front building, and the back buildings on Sansom Street. The court sustained the bill, and awarded the injunction prayed for. As to the stable, the injunction merely prohibited its use "for any purpose whatever, except that of a stable and coach-house." It could not have been any broader, for the reservation expressly permitted its erection, nor did the reservation limit its use or occupancy further than may be implied from the designation of the building as a "stable and coach-house." As to the other buildings, the

injunction was mandatory, and the decree is broad enough to require their destruction.

The answer avers that the erections complained of are the same that existed on the premises when the defendants' testator first viewed and bought the premises in 1875, and had then existed for more than twenty-one years previously. There is no finding by the master which essentially contradicts the answer in this respect. Exact dates are not very material, in our view of the case, as it is undisputed that all the structures were there many years before this bill was filed.

The plaintiff had a choice of remedies. He might have brought his action at law, or he might, as he did, file his bill. By adopting the latter remedy he submitted his case to the conscience of a chancellor, who will or will not enforce a mere legal right, as the equities of the case demand. A chancellor does not, and ought not, to interfere by way of mandatory injunction, even though the injury be clearly established, where there has been long-continued delay in asserting the right, and a remedy exists at law. The plaintiff had only to look out of his side windows to see the erections in the yard, and the bulk-window on Chestnut Street was plainly before him every day as he entered and left his own store. It must not be forgotten that the defendants did not put up the offending building, nor did their testator. He found them there when he purchased the property, and may well have supposed that the restrictions were no longer in force. Be that as it may, the fact remains that the plaintiff was guilty of very gross laches in enforcing his rights. If there is anything well settled in equity, it is that a chancellor will not extend the aid of an injunction where the party has slept for a long time upon his rights. Authorities might be cited without number, were it necessary. I shall refer to a few only.

I find the law upon this subject nowhere better expressed than in 2 High on Injunctions, 1159. It covers the present case so fully that I give the extract at some length: "In considering applications for relief by injunction against the breach of restrictive covenants contained in conveyances of real property, the courts require due diligence upon the part of the plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will ordinarily defeat his application. Indeed, equity requires the utmost diligence in this class of cases upon the part of him who invokes its preventive aid, and a slight degree of acqui-

escence is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant amounts, *pro tanto*, to a disaffirmance of the obligation. Where, therefore, plaintiff lies by for a period of four or five months, permitting defendants to go on with their erections in disregard of the covenant, he will be denied relief by injunction; and where a vendor of real property takes from each of several purchasers a covenant that he will leave unbuilt a certain portion of the premises conveyed, he will not be permitted to enjoin a breach of this covenant by one of the purchasers, when he has permitted prior purchasers to violate it without taking proceedings against them. And generally, whenever plaintiff stands idly by, and permits the erection complained of to be made, and expenses to be incurred therein without objecting, his application for the aid of a court of equity comes too late, and will not be entertained. Thus where purchasers of real estate have bought upon condition that they are to use the land for a specific purpose, and none other, they will not be restrained from using it for other purposes when plaintiff has permitted them to go on without objection, and to incur large expenses in the work proposed, no sufficient excuse being shown for the delay in invoking the aid of equity."

This is the recognized rule in England and this country: See *German etc. Asylum's Appeal*, 115 Pa. St. 165; *Mitchell v. Steward*, L. R. 1 Eq. 541; *Roper v. Williams*, 12 Eng. Ch. 23; *Water Lot Co. v. Bucks*, 5 Ga. 315. In *Clark v. Martin*, 49 Pa. St. 289, where a mandatory injunction was awarded to abate a building erected in violation of a restriction, the application was promptly made before its erection. Indeed, I doubt if a case can be found in the books where an injunction has been awarded after the delay that has been shown here.

This practically disposes of the case. Were it necessary to go further, a strong argument might be made against awarding the injunction by reason of the changed circumstances. When Mr. Burd conveyed this property to Mr. Rockhill in 1825, he lived in the old mansion at the southwest corner of Ninth and Chestnut streets. The lot was over one hundred feet in front, and extended back, with a stable on the Sansom Street front. The house had wings on each side, receding somewhat from the front line of the main building. It was natural that he should restrict the building on Chestnut Street to the line of his wings, and the erection of high build-

ings in the rear; yet he permitted the erection of a stable and coach-house on the rear of the lot similar to his own. After Mr. Burd's death, the whole scene was changed. The old Burd mansion was demolished, and a row of stores now occupy its site. There is nothing to show that the erections on 908 interfere in any sensible degree with plaintiff's enjoyment of light and air. The stable has not been used for many years as such; it is now used as an office by the Edison Light Company. The location is no longer a residential neighborhood, and a stable there would be far more objectionable than its present use, even if it could now be rented for that purpose. This entire change of circumstances and surroundings might well make a chancellor hesitate ere he applied the strong arm of an injunction. There is a line of well-decided cases which hold that such changes in the neighborhood, the character of the improvements, and the purposes to which they are applied, are sufficient to justify a chancellor in refusing an injunction to restrain violations of building restrictions. It is sufficient to refer to *Page v. Murray*, 46 N. J. Eq. 325; *Columbia College v. Thacher*, 87 N. Y. 319; 41 Am. Rep. 365; *Peck v. Matthews*, L. R. 3 Eq. 517; *Sayers v. Collyer*, 24 Ch. Div. 180; *Duncan v. Central Pass. R'y Co.*, 85 Ky. 525.

While we think, for the reasons given, that the plaintiff is not entitled to an injunction, he may still sue at law, and recover damages, if he can show he has sustained any.

The decree is reversed, and the bill dismissed, at the costs of the appellee.

INJUNCTION — LACHES. — Equity will refuse to grant an injunction to one who has been guilty of an unreasonable delay: *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265, and note; *Logansport v. Uhl*, 99 Ind. 531; 49 Am. Rep. 109, and note; *Denver etc. R. R. Co. v. Domke*, 11 Col. 247; *Busore v. Henkel*, 82 Va. 474.

DUNCAN v. HARTMAN.

[143 PENNSYLVANIA STATE, 595.]

AGENCY TO MANAGE PROPERTY, AUTHORITY IMPLIED BY. — An agency to manage property implies authority to do with the property what has previously been done with it by the owners, or others with their express or implied consent, or to do with it what is usual and customary to do with property of the same kind in the same locality.

AGREEMENT GRANTING RIGHT TO QUARRY STONE IS LEASE. — An agreement granting to a person the sole right to quarry, take, and sell stone from a tract of land for a term of fifteen years is a lease of the land. But it is not *prima facie* such a lease of wild mountain land as is ordi-

marily given in the management of such land by an agent appointed for a single year.

LEASE PRIMA FACIE BEYOND AUTHORITY OF AGENT WHEN. — A lease made by an agent appointed for a single year, granting to the lessee the exclusive right to quarry, take, and sell stone from a tract of wild mountain land for a term of fifteen years is *prima facie* beyond such agent's authority. But such a lease may be validated by showing a previous course of dealing with the land by the owners and the agent, which gives a construction by the parties themselves to the agent's authority under his written employment. The burden of proving the validity of the lease is, however, upon the lessee, and it is the province of the jury, though the evidence is undisputed, to determine therefrom whether he has met this burden to their satisfaction.

RATIFICATION OF LEASE BY RECEIVING RENTS. — Where the owners of land, which a person assuming to act as their agent has leased, receive rents under the lease, knowing, or having such notice that they are bound to know, that they came as rents under the lease, this will be evidence of their ratification.

LEASE INFORMALLY EXECUTED BY AGENT PROTECTS LESSEE FROM BEING TREATED AS TRESPASSER WHEN. — A lease of land signed by the agent of the owners, merely as agent, which recites the names of the owners as his principals, and purports to be a grant, not in his own right, but as agent, will, if otherwise valid, protect the lessee in possession from being treated as a trespasser.

TRESPASS brought by the plaintiffs against the defendant. The acts complained of were the taking of ganister stone from the *locus in quo*. The defendant justified his acts under the lease referred to in the opinion. The court instructed the jury to find for the defendant, which they did, and the plaintiffs appealed. Other facts appear from the opinion.

H. M. Baldridge and Alexander King, for the appellants.

Martin Bell and John D. Blair, for the appellee.

MITCHELL, J. The title to the land being admitted in plaintiffs, the defendant had the burden of showing that his act was not a trespass. This he undertook to do by the written agreement between himself and Cooper; and as that set out in express terms that Cooper was acting as agent for the Duncan heirs, defendant was bound to show that it was within Cooper's authority as such agent. Cooper's authority was in writing, and was "to act as our agent for our properties, . . . and honestly and diligently manage said properties." The delegation of power here is very general, but also very vague; and its precise limits must depend very largely on the circumstances as shown by the evidence. It is conceded that it would not authorize the sale of the land, while, on the other hand, it is equally clear that it would

authorize leases in the ordinary form for ordinary terms. Between these extremes may be a series of more or less debatable acts, as to which the only rule that can be laid down as matter of law is, that an agency to manage implies authority to do with the property what has previously been done with it by the owners, or others with their express or implied consent; or further, to do with it what is usual and customary to do with property of the same kind in the same locality. Thus farming land could be leased for terms and upon conditions usual for farms in the neighborhood. If there was an open mine on the land, the management of the property would include the working or leasing of it in any way usual for such mines; while the opening of a mine on land which had never been mined before would be a more doubtful act, and, except in a mining country, would not *prima facie* come within the terms of such an agency.

The agreement between Cooper and defendant granted the latter the sole right to quarry, take, and sell ganister stone from a certain tract of land for the term of fifteen years. Without going into the niceties of distinction between licenses, chattel interests, and sales of minerals *in situ*, as sales of the land, it is sufficient for the present case to say that while the grant from Cooper to defendant was more than a license, because it passed an exclusive interest in the land for certain purposes for the specified term, it was less than a sale, for the term was limited, and stone not actually taken would remain part of the land, and revert to the lessor at the end of the term. It was therefore a lease, a chattel interest, within the case of *Brown v. Beecher*, 120 Pa. St. 590. But the inquiry still remains, whether it was such a lease as is ordinarily given in the management of land similarly situated. *Prima facie* we do not think it was. It is a restriction upon the owner's control of his land for a term of fifteen years; and yet it is given by an agent who was appointed for a single year, which had nearly expired. It was not a grant of a right to take an annual profit which would be replaced by nature, so that the land would come back to the owner in the same condition that it left his control, but a diminution of the body of the land itself, to the permanent diminution of its value. It was analogous to the opening of a new mine, which is a damage to the inheritance, and, as such, is held to be waste in a life tenant. Such a grant cannot fairly be held to be within the power of an agent for the

general and ordinary management of property. The jury, therefore, should have been instructed that the lease from Cooper was *prima facie* beyond his authority, and no justification for the defendant's acts.

It was competent, however, for the defendant to show that the circumstances made the lease valid. This he might do in several ways: 1. By showing that this was a usual and customary way of dealing with land of that kind in that neighborhood; or 2. By showing a previous course of dealing with this land by the owners and the agent, which gave a construction by the parties themselves to the agent's authority under his written employment. This view of the case was discussed by the learned judge in his charge; but he fell into error in ruling it himself, instead of leaving it to the jury. No matter how undisputed the evidence was, its sufficiency was for the jury. The burden was on the defendant to show a course of dealing which would enlarge the *prima facie* powers conferred by the writing, and it was the province of the jury to determine whether the evidence met this burden to their satisfaction. The prior leasing of the ganister to other parties, Bice and McLanahan, was evidence of the willingness of the owners to have this land utilized in this way, and to that extent reduces the force of the objection that this was an extraordinary and un contemplated act of management. But the McLanahan lease, which approximates most nearly to defendant's, seems to have been made with previous consultation, and consent of the owners, and would get its validity from such consent, rather than from Cooper's written authority. The other special instances of long leases, to Delosier, etc., with the attendant explanations and circumstances, were proper for the consideration of the jury, and it was not necessary that they should have been made under the identical authority to Cooper, of January, 1886. A course of dealing may be as well shown under a series of successive, if substantially similar, papers as under one. 3. Defendant was entitled to show that the owners had received the rent which he paid Cooper, or allowed Cooper to use it for their benefit, without objection. This would be evidence of ratification by estoppel; and the jury would be bound to consider the entry of the money on Cooper's books, the accounts that he sent to his principals, their opportunities and habit of examination of his book-entries, the circumstances of the handling of the check of

the ganister company to Duncan, in October, 1887, and the various versions of the conversation that then took place between him and Cooper, etc., as bearing upon the question whether the plaintiffs accepted the money as part of Cooper's receipts on their behalf, knowing, or having such notice that they were bound to know, that it came from defendant as rent under the lease in dispute.

If the jury should find for the defendant, under the foregoing principles, the informal execution of the lease by Cooper would not stand in the way. It purports to be a grant from Cooper, not in his own right, but as agent, and his principals are named as "the Duncan heirs," by which, it appears to be conceded, is meant the plaintiffs. It is not at all analogous, therefore, to *Bassett v. Hawk*, 114 Pa. St. 502, and similar cases, where the instrument purported to grant the attorney's own estate, only, without connecting his principal at all.

Judgment reversed, and *venire de novo* awarded.

LEASE — DEFINITION. — As to what agreements constitute leases, and the essential elements thereof, see *Jackson v. Harsen*, 7 Cow. 323; 17 Am. Dec. 517, and note 520, 521. An instrument giving the right to quarry and take away stone from land for a number of years is not a transfer of the land, but a lease: *Baker v. Hart*, 123 N. Y. 470. To the same effect is *Kils v. Giebner*, 114 Pa. St. 381.

TRESPASSER, WHO IS NOT. — One who enters upon land in good faith, under the belief that he is in the exercise of his rights is not a naked trespasser: *Mississippi etc. R. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608; *State v. Crawley*, 103 N. C. 353.

AGENCY — AUTHORITY. — Evidence of the usage of other agents of a similar character employed by the same principal under the same circumstances is admissible to interpret the powers of an agent: *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611. A power of attorney "to act in all my business, in all my concerns, as if I was present myself, and to stand good in law, in all my land and other business," has been construed not to give authority to sell the principal's realty: *Ashley v. Bird*, 1 Mo. 640; 14 Am. Dec. 313. Authority given to an agent to "manage" a hotel has been decided not to bind the principal for carriages hired and furnished to the guests of the hotel: *Brockway v. Mullin*, 46 N. J. L. 448; 50 Am. Rep. 442.

AGENCY — UNAUTHORIZED LEASE — RATIFICATION. — A leasing of lands by a person unauthorized may be ratified by the owner accepting the rent as it becomes due: *McDowell v. Simpson*, 3 Watta, 129; 27 Am. Dec. 338, and extended note upon the ratification of unauthorized written instruments generally.

HOYT v. HOYT.

[148 PENNSYLVANIA STATE, 622.]

TRADE-MARK, WHAT IS AND WHAT IS NOT. — A trade-mark is a distinctive sign or mark by which the manufactured articles produced by one person, or firm, or maker are distinguishable from those produced by rival manufacturers. It is not an invention, nor does it relate to or affect processes of manufacture or mechanical combinations.

SIZE, SHAPE, OR MODE OF CONSTRUCTION OF THING IN WHICH GOODS ARE PUT NOT TRADE-MARK. — The size, shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put is not a trade-mark.

SIGN, DEVICE, OR MARK ORIGINATED BY ONE MANUFACTURER CANNOT BE ADOPTED BY ANOTHER AS HIS TRADE-MARK. — A sign, device, or mark originated and in actual use by one manufacturer cannot be adopted and registered by another, who takes a fancy to it, as his trade-mark, and such adoption and registration will not confer a title on him who makes it, because it would be an infringement upon the original owner.

MANUFACTURER NOT ENJOINED FROM USING LABEL, BOTTLE, OR MODE OF PACKING WHEN. — A manufacturer will not be enjoined from using a label resembling one used, but not originated, by the plaintiff; nor from using stock bottles to which neither party has an exclusive right; nor from using a method of packing bottles which any one is at liberty to employ.

BILL in equity. The opinion states the case.

William Henry Peace and F. Carroll Brewster, for the appellants.

J. Levering Jones, John G. Johnson, and Carson and Phillips, for the appellees.

WILLIAMS, J. The cases in which a court of equity will interfere to protect a trade-mark are divisible into two classes. To the first of these may be referred those cases in which the trade-mark has been registered under a system provided by law for the protection of the owner in its use. To the other belong all those cases in which there has been no registration, and in which the true ground for interference is the prevention of fraud. In cases falling within the first class, property in the trade-mark is shown by the certificate of registration. In those belonging to the second, the right asserted is of common-law origin, and is shown by proof of the adoption and use of the trade-mark. Its invasion is a fraud upon the owner and the public, to be restrained on principles of common right. All monopolies are odious, and their maintenance in favor even of inventors is limited in duration. When a statu-

tory term of protection is over, whatever is valuable in the subject of the patent becomes, as does an unpatented invention, a contribution to the public welfare, and may be freely used as such. Competition is essential to commerce, and, within legitimate lines, should always be encouraged. "The survival of the fittest," is a law of trade, no less than of the development of living organisms; and from the struggle which determines who and what is "fittest" come general development and progress. As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products. An inventor who secures a patent for his device is protected in his exclusive right during the period fixed by law. When that period expires, his exclusive right expires with it, and thereafter he stands on no higher ground than any other citizen who may desire to use the thing or combination covered by the patent. The rules applicable to trade-marks are quite different. A trade-mark may increase in value to its owners by use, and the law could not put a time limit on the owner's right to it, any more than it could put a limit upon his right to use any other article of property.

A trade-mark is not an invention. It does not relate to or affect processes of manufacture or mechanical combinations. It is a sign or mark by which the manufactured articles produced by one person, or firm, or maker are distinguishable from those produced by rival manufacturers. It must be distinctive, and indicate the personal as distinguished from the geographical origin of the article to which it is applied: *Laughman's Appeal*, 128 Pa. St. 1. Thus Sonman, the name of a large tract of land, cannot be appropriated by one of several owners of land within the tract, to the exclusion of the other owners; nor Lackawanna Valley, by one operator in that valley, to the exclusion of all others. But the trade-mark must relate to and distinguish the goods to which it is applied. For this reason, among others, the size or shape or mode of construction of a box, barrel, bottle, or package in which goods may be put is not a trade-mark. If there is any new and useful combination in the construction of such box or package, it should be patented as an invention, if the owner wishes to prevent others from using it; but such pack-

age cannot be registered as a trade-mark. A sign, device, or mark originated and in actual use by another cannot be adopted and registered by any one who takes a fancy to it, as his trade-mark, and such adoption and registration will not confer a title on him who makes it. It would be an infringement upon the original owner, and from the wrong so done no valid title could grow. A trade name may, in a general way, be treated as a trade-mark, and protected in the same manner. When a business has been conducted by some person or firm under a particular trade name until the public come to regard the name as affording an assurance of the good quality of the article bearing it, the name is a valuable part of the business assets of the person or firm whose skill and integrity have won confidence for it. A rival who should appropriate the trade name to his own use without the consent of the owners, and put his goods on the market bearing it, as though they were made by the rightful owner of the trade name, is guilty of a fraud on the public, and a fraudulent taking from the proprietors, which is, both in intent and effect, a larceny. But when such rival puts his goods on the market, on their own merits and under his trade name, his neighbors have no just ground of complaint if he has imitated, adopted, or improved upon their unpatented methods and processes: *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205; 23 Am. St. Rep. 228.

It only remains to apply these general principles to the case now before us, so far as they are applicable to the questions raised by the appeal of the defendant below. The plaintiffs claim that the front or face label on their bottles has been registered by them as a trade-mark. It is put on obliquely to the length of the bottle. It bears the name of the liquid in the bottle thus: "Hoyt's German Cologne." It also bears the name and residence of the makers, and a reference to the fact of its registration. They also claim the following unregistered trade-marks: A bottle having a depression or panel on the back side; a cap-label over the cork in the bottle; a peculiar mode of arranging and packing bottles in boxes; and in the name of the article sold, viz., "Hoyt's German Cologne." The defendants have a registered label or trade-mark which goes upon the bottle at right angles with its length, and which contains the name of the liquid, "Hoyt's Egyptian Cologne," with a view of a pyramid and the head of the Sphinx, with the names and residence of the makers, and a reference to its

registration. The learned judge of the court below held that F. Hoyt, of the defendant firm, had a legal right to use his own name in his business, and that he could not be enjoined from using it upon goods produced by himself. The correctness of this holding is not raised by the defendants' appeal. The learned judge also held that the defendants' trade-mark or label was not an infringement upon that of the plaintiffs, whether considered by itself or in connection with the champagne-shaped bottles on which it was originally used by the defendants. This also must be regarded as settled for the purposes of this appeal, since the plaintiffs have not appealed, and the defendants cannot, from this ruling. Then, too, the evidence shows very clearly that the bottle with the depression or panel on the back side, which both parties are now using, is a stock bottle, to which neither of them has any exclusive right, and which is freely sold by manufacturers to all who apply. This bottle, as we have already seen, is not a trade-mark. It is not registered, and it is not capable of registration. It is in common use, open to the purchase and use of all who may fancy its shape, in the same manner as the other stock bottles. The cap-label was not originated by the plaintiffs, and does not belong to them. It was devised, according to the uncontradicted testimony, by Dr. David Jayne, a Philadelphia chemist and dealer in medicines, and was used by him and his successors for years before and since the plaintiffs assumed to adopt it as their own. Their adoption of his cap-label gave them no title to it. The mechanical arrangement of the bottles in boxes is neither an invention nor a trade-mark. If the box is an invention, and others are to be prevented from using it, the plaintiffs should have secured a patent for it. Without letters patent they have no exclusive property in the shape or construction of a box. Whatever one manufacturer or tradesman may do to increase the safety of his goods in transportation, or to display them advantageously upon shelves, counters, or in show windows, is simply a good example or model for the public, which any one interested may imitate with impunity.

The debatable ground presented by this appeal is thus seen to be very narrow. It may be learned to the best advantage by considering the language of the court below and the form of the decree made. The decree did not hold the defendants' label to be an infringement, or deny the defendants the use of their name, unless used as an initial word. On the contrary

the learned judge said: "The defendants have also, we think, the right to use the label placed on the sides of their bottles." If, therefore, they made cologne, and sold it in bottles such as they used at first, with their labels upon them, they were exercising a clear legal right, and could not be enjoined. "But," the opinion continues, "the defendants must be enjoined from putting up and offering for sale cologne in the bottles described in the bill, with the labels thereon." The court held that the defendants' label was no infringement, and was lawfully used on a stock bottle with a champagne-bottle shape; but if the same label was used on another stock bottle having a panel on the back side, it became an infringement because of the shape of the bottle on which it was placed, and the use of the label on such a bottle must be prevented by injunction. As both styles of bottle were open to the public as stock bottles, the label was as lawful upon one of them as upon the other. The plaintiffs could no more acquire an exclusive right to a stock bottle by priority of use than they could acquire an exclusive right to Dr. Jayne's cap-label by being the first to appropriate it without his knowledge or consent. Adopting the conclusions of the learned judge, that the label of the defendants did not infringe upon that of the plaintiffs, we cannot sustain this decree. It is accordingly set aside; and as no ground of equitable relief appears upon the record before us, the bill is dismissed, at the cost of the appellees.

TRADE-MARK — WHAT IS AND WHAT IS NOT. — The owner of an original trade-mark will be protected in the exclusive use of all forms, marks, or symbols appropriated as designating the true origin or ownership of the articles to which they are attached: *Alf v. Radam*, 77 Tex. 530; 19 Am. St. Rep. 792, and note. As to what may constitute a trade-mark, see extended note to *Partridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281; *Metcalf v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 282, and note.

TRADE-MARK — PROPERTY IN. — No person can lawfully use any sign or device adopted by another for use on articles of his manufacture, to designate similar articles of different origin: *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485; *Brewer v. Lamar*, 69 Ga. 656; 47 Am. Rep. 766; *Robertson v. Berry*, 50 Md. 591; 33 Am. Rep. 328, and extended note; *Foster v. Blood Balm Co.*, 77 Ga. 216; *Keller v. Goodrich Co.*, 117 Ind. 556.

TRADE-MARK. — A trade-mark must be shown to have existed, before an injunction will issue: Note to *Putnam etc. Co. v. Dulaney*, 23 Am. St. Rep. 229.

CITY OF TITUSVILLE v. BRENNAN.

[143 PENNSYLVANIA STATE, 643.]

CITY ORDINANCE PROHIBITING CANVASSING WITHOUT LICENSE VALID EXERCISE OF POLICE POWER. — A city ordinance, enacted by legislative authority, forbidding any person to engage in the business of canvassing or soliciting within the city for orders for goods, books, paintings, wares, or merchandise of any kind, without first obtaining a license from the mayor, upon payment of certain fees therefor, and imposing a penalty for its violation, is a valid exercise of the police power of the state. And if such ordinance is equal and uniform in its operation, and does not discriminate between citizens of the different states, it is not in violation of the interstate commerce clause of the federal constitution.

ACTION to recover a penalty for the violation of a city ordinance. The defendant was tried, convicted, and fined under the ordinance. The other facts are stated in the opinion.

Roger Sherman and Samuel Grumbina, for the appellant.

George A. Chase, for the appellee.

WILLIAMS, J. There are two questions presented by this record. The first is, whether the court below was correct in finding as a fact that the defendant was a peddler. The other is, whether, as a matter of law, the defendant is engaged in interstate commerce, and is under the protection of the national government. If the defendant is a peddler, the law is settled in this state that he is not above the obligation to conform to the requirements of the laws of the state regulating the business of peddling. The legislature has pronounced his business to be injurious in tendency, and has forbidden any one to engage in it, except under certain regulations, intended to bring such person under the notice of the local authorities, and afford some little security for his good behavior. These regulations have been made in the exercise of the police power, to protect the public from fraud and violence, and they are constitutional and valid: *Commonwealth v. Gardner*, 133 Pa. St. 284; 19 Am. St. Rep. 645.

But what is the defendant's business, as gathered from the facts appearing in the case stated? He certainly is not an importer, or a wholesale dealer supplying the trade in this state, from a source of supply beyond the state lines, in original or unbroken packages. He is not a "drummer," or traveling agent, acting as an intermediary between the importer or the wholesaler and the local trade. Although he carries a few articles on his back or in his wagon, he would

hardly ask us to hold that he was engaged in interstate transportation. He comes into this state, according to the case stated, in order that he may here engage in the business of going from house to house to sell frames and pictures for a dealer who resides in another state. He hunts his customers in their own homes. To the inmates of the homes into which he intrudes himself, he exhibits what he alleges to be a sample of the goods he is prepared to supply. The only apparent difference between him and the ordinary pack-peddler is, that the peddler produces the precise article he offers for sale, and delivers it to the purchaser on the spot, while the defendant produces from his pack a sample. The customer buys on his assurance that the article will be like it, and the article is subsequently delivered by some itinerant, or by express, if it is delivered at all. There is in each case the same intrusive domiciliary visitation, the same relentless personal pursuit of a purchaser, the same practiced and persistent itinerant salesman adroitly pressing his wares on the attention of those who neither need nor wish for them, but who are unable to resist the wiles or penetrate the deceptions practiced upon them. The business of both is, in general character, the same. Whether the difference in mode of delivery should distinguish the one from the other is, in this case, a matter of no consequence whatever.

The ordinance under which this suit was brought is not directed against peddlers by name, but against a particular method of making sales of goods. It forbids any person, whether a citizen of this or any state, to engage in the business of canvassing or soliciting, within the city of Titusville, for orders for goods, books, paintings, wares, or merchandise of any kind, without first obtaining a license from the mayor for that purpose. It does not discriminate against citizens of other states, or goods grown or manufactured in other states. It does not wholly prohibit the exercise of any trade or business. It regulates a particular business in such a manner as to bring those who engage in it under the notice, and so far as possible under the supervision, of the police authorities of the city. Whether the defendant is a peddler is therefore not the question to be settled. It is, whether the defendant is engaged in the business described in the ordinance. If he is, and the agreed facts show clearly that he is, then he must obey it, or show that it is not binding on him. We do not understand that he denies the power of the city to pass such

an ordinance, upon the authority of any of our own cases. The case of *Warren Borough v. Geer*, 117 Pa. St. 207, involved the validity of an ordinance drawn in almost the identical words found in this one. The court below held that the borough had not power to pass such an ordinance, because it interfered with the exercise of a common right. This court held otherwise, and distinctly asserted the power of the borough to make, and the duty of the courts to enforce, the ordinance. But it is urged that the United States courts have held another doctrine, and that we should put ourselves in harmony with the law as held by them. We recognize the duty to which our attention is thus called, and shall discharge it with great pleasure wherever we find ourselves in conflict with the decisions of the supreme court of the United States upon this or any other subject. We are thus brought to consider the so-called "federal question,"—the question whether the man who sells ready-made clothing, pinchbeck jewelry, picture-frames, or other articles, from house to house, by personal solicitation addressed to one whom he has brought to bay in the privacy of his or her own home, is engaged in interstate commerce, and therefore superior to the police power of the states.

We shall not undertake a definition of interstate commerce. It is, perhaps, too early to attempt it; but the supreme court of the United States has provided us with abundant authority upon the real question we have to consider, which is, whether the business of the defendant is subject to the police power. In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, that court laid down the broad proposition that "all rights are held subject to the police power of the state." In the course of a very satisfactory discussion of the subject by the learned justice delivering the opinion of the court, this language is employed: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*." In *Mugler v. Kansas*, 123 U. S. 623, a law which did not regulate, but absolutely pro-

hibited, the manufacture and sale of liquors in Kansas, was sustained as a valid exercise of the police power. To the same effect is *Foster v. Kansas*, 112 U. S. 201. Equally conclusive upon this point are the oleomargarine cases. This state forbade both the manufacture and sale of that commodity, except under restrictions which were destructive to the business. We held the law valid as an exercise of the police power, and on appeal the supreme court of the United States affirmed the decision: *Powell v. Pennsylvania*, 127 U. S. 678; *Walker v. Pennsylvania*, 127 U. S. 699. The fact that the article the manufacture and sale of which is regulated or prohibited is made under the authority of letters patent granted by the United States does not prevent the exercise of the police power of the states. In *Patterson v. Kentucky*, 97 U. S. 501, this question was raised, and it was held that letters patent confer no new or independent right of sale, but secure an exclusive right in the discovery to the inventor or his representative. This right is incorporeal, but "the use of the tangible property that comes into existence by the application of the discovery is not beyond the control of state legislation." On the other hand, it was distinctly held in *Patterson v. Kentucky*, 92 U. S. 501, "that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power, with which the states have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." In *Webber v. Virginia*, 103 U. S. 344, it was said by Mr. Justice Field, delivering the opinion of the court, that "the patent for a dynamite powder does not prevent the state from prescribing the conditions of its manufacture, storage, and sale, so as to protect the community from the danger of explosion." But while the existence of the police power is thus clearly recognized by the courts of the United States, it must be exercised by means of laws that are equal and uniform in their operation. It must not be made use of as a means for discriminating between citizens of the different states. If it is, it loses its police character, and becomes an unconstitutional trade regulation. Thus the state of Missouri passed a law prohibiting the sale of goods grown, or produced, or manufactured outside of that state, without a license. To sell the same goods grown, produced, or manufactured within the

state, no license was required. This law was held to be void, because it was designed to operate against the citizens of other states, and in favor of the citizens of Missouri: *Welton v. Missouri*, 91 U. S. 275. When the burden imposed is equal, without regard to citizenship, similar laws have been upheld: *Coe v. Errol*, 116 U. S. 517. If the defendant was an importer of frames, there could be no doubt of his right to ship them in original bales or packages into the state, and in that condition to sell them. There is just as little doubt of his right to ship into the state one frame, for there is no law of the state which prohibits his sale of a single frame. What the law is aimed at is, not the sale of frames at wholesale or at retail, but personal solicitation from house to house by canvassers, who, like peddlers, are here to-day and gone to-morrow; whose flippant representations cannot be stopped, and whose frauds cannot be punished, unless they are brought under the notice and to some extent under the control of the local authorities.

What trades need to be restricted and forbidden to all who have not obtained a license is purely a legislative question. The sale of liquors, the keeping of a hotel, the running of a cab, the keeping of a lottery, the sale of lottery tickets, the practice of medicine, the manufacture of oleomargarine, peddling from house to house, and many other kinds of business have been the subject of regulation, restriction, or prohibition by an exercise of the police power of the several states. Where the courts have interfered in such cases, it has been, not to prevent the exercise, but to prevent the abuse, of the police power, and to see that its hand was laid impartially, and without discrimination between states, on the evil to be corrected. Whether the solicitation from house to house by itinerant venders or canvassers is an evil to be suppressed or reduced in its proportions by appropriate legislation is, under ordinary circumstances, as we have said, a legislative question. If it was for us to determine, a glance at our own cases would determine it. The books are full of cases arising out of the efforts of those who have been defrauded to recover their money, or to be relieved from their bonds or notes given under the influence of a bald fraud, or wheedled out of them under pretense that they were signing a receipt, an order, a promise to act as agent, or the like. There is probably not a county in the commonwealth into whose courts the victims of the frauds of traveling canvassers for morus-multicaulis trees, patent churns, hay-forks, washing-machines, self-hooking or

self-unhooking whiffletrees, and a hundred more equally worthless things, have not come by petition to open judgment, or by affidavit of defense to an action, seeking relief. It is the same story. A well-dressed, plausible stranger, with flattery and promise of enormous gains, induces some honest but inexperienced man to sign a paper promising to exhibit some worthless article left with him to his neighbors, or to pay for it at a small price, when he has sold it at a large one, or the like, and goes his way. Not long after, some other stranger presents to the astonished victim his promissory note for one, or two, or five hundred dollars, and demands payment. It next turns up in the hands of some note-shaver, and then litigation begins. The loss to industrious, well-meaning people by these practices reaches many thousands of dollars every year. It goes to support in idleness a class of swindlers who should be in prison. The subject is as fairly within the scope of police legislation as cheating by false pretenses, or larceny by a bailee. We should as soon expect the thief who stole goods in one state to be sold in another to be protected under the interstate commerce powers of the general government, as that the traveling cheats who live by drawing the blood of the hard-working, but too confiding, farmers and mechanics should be so protected. It may be that the defendant is honest, and sells a good frame for an honest price. There are, no doubt, some honest peddlers and canvassers, worthy men and women, who are needy, and find this a convenient way to earn money. The trouble in such cases is, that they are in a business that men and women who are not honest employ as a means of swindling, and that the business is therefore properly put under some regulations and restrictions, that seem to them, and that in their cases may really be, unnecessary and burdensome. If they choose to embark in the sale of strong drink, or in the sale of goods as peddlers or as canvassers, or of oleomargarine, they must take notice of the restrictions laid upon the business they select, and comply with them.

The judgment is affirmed.

POLICE POWER — LICENSE — PEDDLERS. — The state may pass a statute requiring one to procure a license who goes from place to place within its borders taking orders for and selling goods or other personal property: *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874, and note. But compare *Emmons v. Lewiston*, 132 Ill. 380; 22 Am. St. Rep. 540, and note.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

**LANCASTER MILLS v. MERCHANTS' COTTON-PRESS
COMPANY.**

[29 TENNESSEE, 1.]

PRACTICE. — UNDER A PRAYER FOR GENERAL RELIEF, complainant is entitled to such other and additional relief from that specially prayed for as the allegations of his bill will support, if established by competent evidence.

COMMON CARRIER IS EXEMPTED FROM LIABILITY FOR LOSS OF GOODS BY FIRE IF THE BILL OF LADING PURPORTS TO EXEMPT HIM from liability from loss by fire at any depot, station, landing, or warehouse, if the property, consisting of cotton, is destroyed by fire, without any negligence of the carrier, and while in the warehouse of a press company, in which it was necessary for it to be for the purpose of compression before shipment.

COMMON CARRIER. — CONSIDERATION FOR A STIPULATION IN A BILL OF LADING EXEMPTING CARRIER FROM LIABILITY for a loss by fire while the property to be carried is in a warehouse, depot, or station will be presumed, if such stipulation is in a through bill of lading, and a through-rate was granted for carriage over the lines of more than one carrier.

CARRIER IS NOT LIABLE FOR LOSS OF GOODS BY FIRE WHILE IN THE WAREHOUSE OF ITS AGENT, in the absence of negligence on the part of the carrier or agent, when the bill of lading stipulates against liability for loss by fire during the time the goods are at any warehouse, depot, etc.

CARRIER — NEGLIGENCE — BURDEN OF PROOF. — One who seeks to hold a carrier liable for a loss of goods by fire while in the hands of a warehouseman must allege and assume the burden of proving that such loss resulted from the carrier's negligence, if the bill of lading purports to exempt the carrier from liability from loss by fire when the property is in any warehouse.

PRACTICE. — UPON BILL CONFESSED, complainant is not entitled to any relief beyond the fair scope of the allegations and prayer of his bill.

THE DUTY OF WAREHOUSEMEN imposes on them the exercise of ordinary care only, or in other words, the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances.

WAREHOUSEMAN WILL NOT BE HELD LIABLE ON ACCOUNT OF A DEFECT IN HIS WAREHOUSE for a loss of goods by fire, when such defect did not cause the fire nor in any way contribute to the loss.

BURDEN OF PROOF, AS BETWEEN BAILOR AND BAILEE, IS AS FOLLOWS: The bailor must prove the contract of bailment and the delivery of the goods; then the bailee, if he wishes to exonerate himself from liability for their loss, must show the fact and manner of loss; and the bailor must assume the burden of establishing that the loss, though by fire, was due to the negligence of the bailee.

NEGLECTANCE IS NOT PRESUMED FROM THE DESTRUCTION OF GOODS BY FIRE while in the hands of a bailee for hire, and if the bailor seeks to recover of the bailee on account of the latter's negligence, he must allege and prove it.

CONTRACT — INTERPRETATION OF, BY AID OF EXTRINSIC CIRCUMSTANCES. — When a cotton-press company receives cotton and issues dray receipts therefor, which are surrendered by the owner to a common carrier, which issues its bill of lading for the cotton described therein, the obligation of the cotton-press company is not terminated by such surrender, nor is it wholly measured by such receipts; but in order to determine the extent and character of this obligation, we must look to the course of business between the company and depositors of cotton, its relations to cotton buyers and shippers, and its relations, contractual and otherwise, to the carrier who issued the bills of lading upon its dray receipts, and the representations made by its officers and agents to those doing business with it, and especially to those who took and surrendered such receipts.

INSURANCE — A CARRIER HAS SUCH AN INSURABLE INTEREST IN THE GOODS ENTRUSTED to it for carriage that it may insure not only its interest or its liability, but the whole value of the goods; and upon so doing, may collect the whole value, and after reimbursing itself for its special loss, hold the surplus in trust for the owners.

INSURANCE FOR THE BENEFIT OF A CARRIER UPON GOODS IN ITS CUSTODY, IF NOT LIMITED TO THE INSURANCE OF ITS LIABILITY OR INTEREST, is an insurance of the whole value, and one in which the owner has therefore an interest; and extrinsic evidence is not admissible to control the effect of a policy in this respect, by showing that the insurer and assured intended to insure only the interest or liability of the carrier.

WAREHOUSEMAN'S OBLIGATION TO INSURE. — If, by the terms of a contract between a common carrier and a cotton-press company, the former agrees that the latter shall press all cotton which the carrier desires to have pressed during the continuance of the agreement, and that the press company shall warehouse the same, load it, after being compressed, on the cars of the carrier, and insure it while in its custody for the benefit of the carrier, the obligation of the press company is to insure against loss by fire all cotton in its presses for its full value, and covering every interest therein. Such obligation is not limited by the life of the dray tickets issued by the press company, nor by the surrender of such tickets and the issuing of a bill of lading by a carrier, but continues as long as the cotton remains in the custody of the press company.

WAREHOUSEMAN'S LIABILITY TO OWNER OF PROPERTY FOR NOT EFFECTING INSURANCE THEREON. — If a warehouseman agrees with a common carrier to receive goods from the latter, and to insure the same while in his keeping for the benefit of the carrier, and after receiving goods pursuant to such agreement, fails to insure them, he is answerable to the owners thereof for any damage resulting to them from the failure to procure insurance as stipulated.

INSURANCE — CARRIER NOT LIABLE FOR NOT EFFECTING. — A common carrier which procures a contract with a cotton-press company, whereby the latter agrees to insure all goods intrusted to it, does not thereby assume the obligation to insure such goods, nor make itself answerable to their owner for the failure of the press company to insure as it agreed to do.

WAREHOUSEMAN INSURING PROPERTY IN HIS CUSTODY UNDER A CONTRACT REQUIRING HIM SO TO DO is, in respect to such insurance, the trustee of the owners, and, as such, bound to make proofs of loss, and to institute proceedings for collection.

BREACH OF CONTRACT TO PROCURE INSURANCE — MEASURE OF DAMAGES. — A contract to procure the insurance of property for the benefit of its owner is very different in its legal effect from the absolute liability of an insurer. If the insurance is not procured as stipulated, and the property is subsequently lost, the owner cannot recover for a breach of the contract, if his loss was in fact covered by insurance effected by himself, and the breach of the contract to procure insurance has not damaged him.

INSURANCE — PAYMENT OF LOSS, WHAT IS. — If, after a loss has been suffered, the insurer pays the assured a sum of money equivalent thereto, but exacts and receives from the latter a writing declaring that he has borrowed such sum as a loan pending an investigation and determination whether the loss is one for which the carrier should be held liable, and that if the carrier should be so held, the assured agrees to return such sum, when and to the extent it shall be recovered from the carrier, the transaction constitutes a payment of the loss, and not a loan.

INSURANCE — SUBROGATION. — If A agrees to have the property of B insured against loss by fire, but is guilty of a breach of his agreement, and B himself procures insurance against such loss, after which the property is destroyed by fire, and the insurance paid to B, whereby he is indemnified for all his loss, he has no cause of action against A, because A's breach has done him no damage; nor has the insurance company any claim against A. It cannot be subrogated to any cause of action in favor of B, because he has none.

A NUMBER of suits were brought against the cotton-press company and against various railway companies, arising out of the loss of fourteen thousand bales of cotton of the value of seven hundred thousand dollars, destroyed by fire while in the press of the defendant company at Memphis, Tennessee. This particular suit was instituted to recover the value of 413 bales, and the Merchants' Cotton-press and Storage Company, the Newport News and Mississippi Valley Railroad Company, and the Indiana, Bloomington, and

Western Railway Company were made parties defendants. The last-named company filed no answer, and a decree *pro confesso* was entered against it, declaring its liability to be subordinate to that of the other defendants. There was also a decree entered for the full value of the cotton against the other defendants, the liability of the press company being adjudged to be primary, and that of the Newport News and Mississippi Valley Railroad Company to be secondary. From this decree appeals were taken. The cotton for the loss of which recovery was sought was purchased at Memphis, Tennessee, on November 16, 1887, and on the same day delivered to the cotton-press company for compression and delivery to the Newport News and Mississippi Valley company, to be by it in turn delivered to the Indiana, Bloomington, and Western Railroad Company. The latter company issued a bill of lading, stipulating that "neither this nor any other carrier shall be responsible for any loss or damage to said property by fire or flood while at depots, stations, yards, landings, warehouses, or in transit." The bill further declared that neither carrier should be liable for loss except on its own line, and that any carrier over whose route the cotton is to be transported shall have the privilege, at its cost, of compressing the same, and shall not be held responsible for unavoidable delays in procuring compression. The compress company had contracts with every railway entering Memphis, and its contract with the Newport News and Mississippi Valley company was as follows:—

"COPY OF CONTRACT BETWEEN THE COMPRESS COMPANY AND THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY.

"This agreement, made on the fifteenth day of November, A. D. 1886, by and between the Newport News and Mississippi Valley company, hereinafter termed the party of the first part, and the Merchants' Cotton-press and Storage Company, of Memphis, Tennessee, hereinafter termed the party of the second part, and witnesseth as follows:—

"1. All cotton which the said first party may desire to compress at Memphis during the term of this agreement shall be compressed by the second party alone, who shall also warehouse the same such time as may be required, and load the same, after being compressed, on the cars of the first party, as well as shall insure the same while in his keeping for the benefit of the first party, and the price to be paid therefor by said first party shall be at the rate of twelve and one half (12½)

cents per one hundred (100) pounds bill of lading weights for all such cotton so compressed, etc., on and prior to the thirty-first day of August, 1887, and ten (10) cents per hundred (100) pounds bill of lading weights for all cotton compressed, etc., thereafter during the term of this agreement. This compensation covers compressing, loading in cars, and insurance, as well as the use of the second party's grounds, sheds, platforms, and all services rendered by said second party in and about such cotton delivered it hereunder until the same is delivered to and loaded on the cars of the first party by said second party.

"2. Such compressing and loading on the first party's cars is to be done by the second party promptly, and such cotton shall be compressed so that the average lading shall be not less than twenty-six thousand (26,000) pounds per car of average size.

"3. Such insurance shall be taken for the benefit of the first party in good and solvent companies, so as to cover any loss while such cotton is under the second party's control, and until loaded on the first party's cars.

"4. The second party shall be liable for any loss arising from negligence or lack of care in any wise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire, and for any such loss shall pay the first party all damages and cost, or the first party may retain any dues to the second party to cover such loss. This, however, not to be limited to the amount of such dues.

"5. The first party hereby constitutes the second party its agent to receive such cotton for it, and sign receipts on which bills of lading may be issued when cotton is delivered in compresses or grounds in the navy-yard, alongside the tracks of the first party.

"6. So far as it can legally so do, the first party agrees to establish no other compress agency nor employ any other compress to do its compressing of cotton at Memphis during the term of this contract.

"7. In case, at any time during the term of this contract, the second party shall do for any other person the like service as herein agreed to be rendered the first party for a less rate than that above stipulated, then the first party shall pay no more than such lower rate for any compressing hereunder; and in case, during the term this contract is to run, any other compress company, organization, person, or corporation should

establish other compresses at Memphis (called the taxing district of Shelby County), Tennessee, and do, or propose to do, compressing and the other services above agreed to be done by the second party at a lower rate than that above stipulated herein, having equal facilities therefor and proposing to do such compressing in good faith, then the second party agrees and binds itself thereafter, during the time such lower rate continues in force by such competitor, to render the services and do the things hereinabove stipulated at such lower rate so offered or done by such other person, corporation, etc. However, if and when such competitive or lower rate is withdrawn, then the rate hereinabove fixed shall again become in force.

"8. All bills for compressing cotton shall be paid weekly.

"9. Said compress company guarantees correct loading of such cotton in said first party's cars and the correctness of the loading-list for same.

"10. This contract is to continue in force until the thirty-first day of August, 1896, said rate of twelve and one half (12½) cents per one hundred (100) pounds being for one year from the first day of September, 1886, and said rate of ten (10) cents per one hundred (100) pounds for the remaining nine years, and this contract is to relate back to the said 1st of September, 1886, and is to cover, as to its terms, all compressing of cotton done by the second party for the first party since that date.

"11. The contract heretofore made between the Chesapeake, Ohio, and Southwestern Railroad Company and the second party above, of date the twenty-fifth day of August, 1884, is hereby abrogated and annulled.

"And it is further agreed, and one of the terms of this contract, that the second party will compress cotton for the first party as rapidly as it is prepared to forward same, and in case of the second party's failure to so do at any time, the first party shall have further right to arrange with others for such service during the second party's failure aforesaid.

"In witness of all of which, the said contracting parties have caused the names of their respective officials to be signed in duplicate hereto.

"NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,

"By JOHN ECHOLS, Third Vice-President.

"MERCHANTS' COTTON-PRESS AND STORAGE COMPANY,

"By NAPOLEON HILL, President."

Upon the receipt of the cotton from drays, the press company issued dray tickets, which, so far as material, were as follows: "Received of William Bowles and Sons by the Merchants' Cotton-press and Storage Company, and covered by them with insurance for the owners, as interest may appear, the following cotton, in good order, at press No. 4." The dray tickets were delivered to the general freight agent of the Indiana, Bloomington, and Western Railroad Company, which issued its bill of lading in lieu thereof, and gave notice to the compress company of this fact, and directed it as to the route over which shipment should be made. On the day after the receipt of the cotton, and before its compression, it was totally destroyed by fire, and the insurance which had been effected by the company on the cotton in its custody was not sufficient to indemnify the owners against the loss sustained. The plaintiff herein had, however, a running policy of insurance issued to it by the Insurance Company of North America. Under this policy, that insurance company paid to the complainant an amount equivalent to its loss, and took a receipt or agreement which is set out in the opinion, and under which it was insisted that the moneys so paid were not received in payment of the loss, but merely as a loan from the insurance company to the complainant.

Metcalf and Walker, and Turley and Wright, for the Merchants' Cotton-press Company.

Holmes Cummins, for the railway company.

Taylor and Carroll, H. C. Warriner, and C. W. Fraser, for the complainant.

LURTON, J. This case has been very ably and elaborately argued, and we deem it not inappropriate to acknowledge our very great indebtedness to the learned counsel who have appeared in the cause.

The first question which we shall consider is as to the liability of the railway defendants for a breach of their obligation as carriers of goods. The decree of the chancellor against them was predicated upon a supposed obligation by contract to cover with insurance the cotton of complainant. It has been, however, very much pressed upon us that the carrier is liable upon a wholly different ground, to wit, for a breach of duty and contract as carrier, and that its liability in this respect is primary and absolute, regardless of any special

obligation to insure. A careful examination of the pleadings discloses no allegation of fact which as matter of law would entitle complainant to any decree against either railway company for a liability as carrier.

The primary object in making the railway companies defendants, as indicated by the form of the original bill and the relief especially prayed, seems to have been to reach the compress company through subrogation to the rights of the railway company having a contract with the former for insurance covering cotton while in its warehouse for compression.

The bill concludes with a prayer for general relief; and if the facts stated in the pleadings are such as would entitle complainant to other or different relief than that especially prayed, then, under well-settled rules of equity pleading, such other appropriate remedy may be granted. The facts which involve any question of direct liability of the railway defendants as carriers, which are stated in the bill, are briefly as follows: 1. That the Newport News and Mississippi Valley company had issued its permit for the admission of this cotton into the press designated for cotton intended for shipment over its line, on account of the Indiana, Bloomington, and Western railway, a connecting carrier; 2. That this delivery to the compress company was for compression and delivery to the Newport News and Mississippi Valley company as initial carrier, to be by it transported and delivered to the Indiana, Bloomington, and Western railway as a connecting carrier; 3. That the dray receipts of the compress company had been delivered to the Indiana, Bloomington, and Western railway, and its through bill of lading accepted for carriage of the cotton at through-rate of freight from Memphis to Clinton, Massachusetts; 4. That the cotton was burned while yet in the actual custody of the compress company, but after issuance of bill of lading.

This bill of lading is made an exhibit to the bill, and contains, among other things, the following special stipulations: 1. That any carrier over whose line the cotton may pass shall have the privilege, at its own expense, of compressing the cotton for convenience of carriage; 2. That the carrier shall have exemption from liability for loss or damage by fire "while at depots, stations, yards, landings, warehouses, or in transit"; 3. That each connecting carrier shall have the benefit of all the stipulations of the bill of lading; 4. That each connecting

carrier shall be responsible only for loss or damage occurring on its own line.

On these facts it may be assumed that while the actual custody of the cotton was with the compress company at time of the loss, yet, as between the owner and the railway line, there was a good delivery to the carrier under the bill of lading, which provided especially for compression, and which accepted delivery at the warehouse of the compress company as a delivery to it. Inasmuch as the Indiana, Bloomington, and Western railway was not a line having tracks entering Memphis, and inasmuch as the bill alleges a delivery was to be made by the compress company to the Newport News and Mississippi Valley company for carriage and delivery to the Indiana, Bloomington, and Western railway as the company issuing bill of lading and as connecting carrier, it may be assumed that the liability of the Newport News and Mississippi Valley company was precisely the liability of the Indiana, Bloomington, and Western railway, and that the cotton was held by the compress company for compression for and on account of the Newport News and Mississippi Valley Company, and for delivery on its cars when compressed.

The liability of both the Indiana, Bloomington, and Western railway and the Newport News and Mississippi Valley company is to be determined by the common law, except in so far as modified by valid stipulations contained in the bill of lading. The exemption from liability for loss by fire at any "depot, station, yard, landing, or warehouse," contained in bill of lading, is sufficiently comprehensive to cover a loss by fire in the warehouse of the compress company. In view of the stipulation for compression, before shipment, contained in the bill of lading, and the actual delivery by the shipper to the compress for compression, it would be unreasonable to hold that a stipulation for exemption while in "warehouse" did not cover cotton while warehoused for compression.

The validity of this fire clause is not questioned in the pleading, either by allegation that it was without consideration, or imposed by duress, or unreasonable for any cause. In such case, it appearing that it was contained in a through bill of lading, wherein a through-rate was granted, for carriage over line of more than one carrier, it will be presumed that the stipulation was upon a sufficient consideration and reasonable. This exemption would, however, be invalid as a protection against a loss by fire, the result of the negligence of

the carrier or of its agent for compression. The bill fails to charge that the loss was due to any want of care, either upon the part of the carrier, or of any of its agents or servants. Where, therefore, the pleadings show a valid stipulation for exemption from loss or damage by fire, and it is further shown that the failure of the carrier to safely carry and deliver was due to a loss by fire, no case is made against the carrier, unless the fire be charged to have been the result of negligence. The burden of proof, when the loss is thus admitted to have been by fire, is upon the owner to prove negligence, and under plainest rules of pleading, the plaintiff ought to allege in his pleading every fact necessary to fix liability: *Louisville etc. R. R. Co. v. Manchester Mills*, 88 Tenn. 653.

We are therefore of opinion that, under the pleadings, no such facts are stated as would entitle complainant to any decree against either of the railway defendants for any breach of duty as carriers. The decree *pro confesso* against the Indiana, Bloomington, and Western railway did not authorize any final decree fixing liability upon it for this loss. No relief can be granted upon a bill in equity taken for confessed, beyond the fair scope of the allegations and prayer of the bill: *McGavock v. Elliot*, 3 Yerg. 374; *Ross v. Ramsey*, 3 Head, 16.

The decree actually pronounced was based upon the supposed liability of that company under an obligation to insure, and not by reason of any breach of carrier duty. That decree is not before us for review, inasmuch as that company has not appealed; but as it is now sought to affect the defendants who have appealed, by reason of the assumed liability of the non-appealing carrier, we have felt it necessary to consider the weight to be attached to the decree against the Indiana, Bloomington, and Western railway.

2. Is the defendant compress company directly liable to complainant as for a breach of duty as warehouseman?

The seventh issue submitted to the jury involved the degree of care and diligence required to be exercised by the cotton-press company, with regard to precautions against fire, and saving cotton from fire, at and before this loss.

The jury were instructed upon this issue, that "if you find that the defendant compress company held this cotton at the time of its destruction as warehouseman only (that is, for storage and compression, without any superadded obligation, and in this connection you need not consider the question of insurance), then the law imposed on it, as the measure

of its duty, ordinary care, or, as specifically stated by an eminent law-writer, 'the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances, or that which business men, experienced and faithful in the particular department, are accustomed to exercise when in the discharge of their duties.' The warehouseman must erect a good building, reasonably suited and adapted for safe-keeping of the particular property intended to be taken care of (it need not be fire-proof), and he must keep it watched in proportion to the risks he is subject to and the value of the goods with which he is likely to be intrusted, having, of course, in view the position in which his building is to stand, and his capacity of thus burdening himself without incurring unjustifiable expense."

They were further instructed, that if they found any other duty was superadded by agreement or confidence, aside from insurance, that then they should report what such superadded duty was, and what degree or measure of care was imposed thereby, and that, in case of such superadded duty, the law imposed as the measure of care extraordinary diligence. The jury was likewise fully instructed as to the grades of diligence implied from the terms "ordinary care" and "extraordinary care."

The response of the jury to this issue, as defined by the charge quoted, was in the following words: "In response to the seventh issue, they find and answer: The jury are unable to determine from the evidence the immediate cause of the fire. As to the measure of care and diligence used in protecting and caring for the cotton as warehouseman, the jury are of the opinion that ordinary care and diligence was used in the warehouse proper, or upstairs, both before and at the fire, the water supply seeming ample, and the engine and hose were handled with promptness and intelligence; but, in the opinion of the jury, the construction of the warehouse was faulty in some respects, especially in not being closed up on the west side, or river-front, below the level of the floor where cotton was held. The jury think this space or opening should have been closed up, or there should have been a watchman stationed under the warehouse, or on the levee in front of the warehouse."

The charge of the learned chancellor was full and without error in defining responsibility of warehousemen: *Waller v. Parker*, 5 Cold. 477; Schouler on Bailments, sec. 101.

The finding of the jury must be construed as a finding that the compress company was liable only as a warehouseman, and that neither by "agreement or confidence" had it assumed any other or higher responsibility than that of warehouseman for storage and compression. If it had assumed absolute responsibility for the safe-keeping of the goods, or direct liability for a loss by accidental fire, the jury should, under this charge, have reported such superadded duty or responsibility. Under the rule of ordinary care, this finding acquits the defendant of negligence, unless the defect in the building pointed out by the jury in some way was the proximate cause of the loss, or contributed to the loss. We have carefully examined the very voluminous proof upon this question of negligence, and are entirely satisfied with the finding of the jury, and with the decree of the chancellor holding that no negligence was established.

The defect in the building referred to by the jury does not appear to have in any way contributed to the loss, or to have been the cause of the fire. There is a total want of connection between the negligence and the injury. This want of causal connection is fatal to any demand that a decree should pass finding a loss by negligence. The rule, as we understand it, is, that "the burden of proof is upon the bailor to prove the contract and the delivery of goods; then upon the bailee to show their loss and the manner of the loss. The burden then shifts to the bailor to establish that the loss was due to negligence": *Runyan v. Caldwell*, 7 Humph. 184; *Louisville etc. R. R. Co. v. Manchester Mills*, 88 Tenn. 658; Schouler on Bailments, sec. 101.

Under this rule, the burden of proof was upon complainant to show that this fire was the probable result of negligence. If this defect in construction of building can be shown to have been the proximate cause of the fire, or to have contributed to the loss, then the liability is made out; but the proof makes it absolutely certain that this fire did not originate from beneath the building,—the exposed part,—but that it originated upon the heads of bales of cotton standing on end upon the floor. At the time it was discovered it did not cover more than the heads of three bales. If it had appeared that the fire originated on the floor or beneath the floor, then a connection between the defective and exposed building and the fire would have been rendered probable. The loss, therefore, was not, in the opinion of the

chancellor, attributable to this exposure of the under parts of the warehouse to the invasion of the tramp or the torch of the incendiary. In this view we agree with him.

The answer of the defendant compress company presents an issue of negligence which was wholly unnecessary, in view of the failure of complainant to charge negligence. No presumption of negligence arises from the destruction by fire of goods in the hands of a bailee for hire. This we had occasion to consider at this term in *Louisville etc. R. R. Co. v. Manchester Mills*, 88 Tenn. 653. Therefore, a bill alleging a loss by fire of goods in hands of bailee should, in order to make an issue, charge such loss to have been by negligence. In view, however, of the fact that the answer presented an issue, and that the parties went to the jury upon the issue thus made in the answer, we have, without committing ourselves to the sufficiency of the pleading, treated the question of negligence as sufficiently raised, so far as the compress company is affected.

8. It is next insisted that, under the facts of this case, the obligation of the compress company is that of an insurer against loss or damage by fire; that its liability is not for a breach of obligation to take out insurance, not for damage resulting from false representation that its policies were sufficient in terms and amount to cover owner's interest in all cotton while in its compress, but that it is liable as an insurer.

It may be assumed that the corporate powers of this defendant were ample to authorize it to contract with its customers that it would assume liability for any loss by fire, whether accidental or the result of its negligence. But did it do so? The contracts between the railway lines and the compress company explicitly negative any idea of such liability. These contracts require of the compress company that insurance for the benefit of the carriers should be taken "in good and solvent companies." The dray-ticket receipts stated that the cotton was "covered by them with insurance for the owner as interest may appear." This form of dray ticket was not habitually used. The statement on these receipts varied, and shippers seem to have themselves dictated the terms in which this insurance obligation was stated. The following forms of dray receipts are shown to have been in use at the date of this transaction: —

“MEMPHIS, TENN., Oct. 20, 1887.

“Received at the Merchants' Cotton-press and Storage Company No. 4, from Jones Bros. & Co., the following cotton, in good order:—

“N. B.—It is agreed and understood that the cotton enumerated below is fully covered by the policies of insurance of the Merchants' Cotton-press and Storage Company of Memphis.

Marka.	No.	Cotton Bales.
ETON.	25	Twenty-five B. C.
Jones.		Cooper.
		Me. I.”

“MEMPHIS, TENN., —, 188—.

“Received of A. A. Paton & Co., by Merchants' Cotton-press and Storage Company, for compressing, and covered by them with insurance, the following cotton, in good order, at press No. —.

“If held in press over fifteen days before bill of lading issues, or if sold while in press, fifty cents per bale per month charges will be collected before delivery or shipment.

“Oct. 21, 1887.”

“MEMPHIS, TENN., —, 188—.

“Received by the Merchants' Cotton-press and Storage Company, from E. L. Topp & Co., the following cotton, in good order and condition, to be compressed.

“If held in the press over fifteen days before the bill of lading issues, or if sold while in press, fifty cents per bale per month charges will be collected before delivery or shipment.

“Oct. 22, 1887.”

“MEMPHIS, TENN., 10—1887.

“Received of C. E. F. Hall, Agent, in good order, the following cotton, marked as per margin by —.”

“MEMPHIS, TENN., 9, 28, 1887.

“Received at the Merchants' Cotton-press and Storage Company No. 4, from Alsobrook, Bowling, & Co., the following cotton, in good order:—

“N. B.—It is agreed and understood that the cotton enumerated below is fully covered by the policies of insurance of the Merchants' Cotton-press and Storage Company.

“Subject to storage and insurance if held in the press over fifteen days before bill of lading is issued. Not transferable without charges from date of receipt.”

The voluminous proof as to "course of business," "general understanding," and "local custom" has been carefully examined, and we concur with the chancellor in holding that there was no such uniformity in the "course of business" or concurrence in "general understanding" between the compress company and the buyers and shippers at Memphis as to constitute proof of any assumption of the liability of an insurer. As to verbal agreements and representations concerning this obligation and its extent, the finding of the jury seems conclusive against the claim now asserted by complainant.

In response to the third issue of fact, the jury responded that "they assumed a liability, verbally and according to terms of the written contracts, to carry insurance for the benefit of railroads, transportation lines, or owners upon all cotton in bales while in their possession."

In response to the fourteenth issue, which called for a finding as to representations made as to its liability for cotton destroyed by fire, the jury responded that it "represented to the agent of complainant that the cotton in their (the compress company's) presses was fully insured, as per contract already exhibited in answer to the first issue."

These findings are abundantly sustained by the evidence, and we decide that the compress company did not agree or promise, verbally or otherwise, to assume the responsibility of an insurer against loss or damage by fire.

4. This brings us to a consideration of the alleged obligation of the compress company to carry insurance in terms and amount sufficient to cover the interest of owners until actual delivery to the carrier.

The learned chancellor, in an able and elaborate opinion, reached the conclusion "that both the Newport News and Mississippi Valley Company and the compress company assumed an obligation to fully insure the cotton in the press from the moment it was received there until it was delivered on the cars for transportation."

The position of counsel representing the compress company presented in pleadings and in argument is, that its contract for insurance of owner's interests is found alone in its dray-ticket receipts, and that upon the surrender of this contract to the carrier, and the acceptance of bill of lading, the compress company ceased to bear any relation, by contract or otherwise, to the depositor of cotton, and that the carrier was

substituted in the relation of bailor formerly held by the depositor, and that the latter must thenceforward look alone to his bill of lading and to his own insurance for protection; that, on the other hand, the relation and liability of the compress company to the carrier who had taken up the dray tickets, and in exchange given its own bill of lading, is not identical with that formerly held by the depositor, but is to be determined alone by the written contract for compression existing between the carrier issuing bill of lading and the compress company. This argument concedes that the interest of owners was within the insurance obligation assumed by the defendant until terminated by surrender of the contract contained in dray ticket to the carrier. This position assumes that the dray receipts, in themselves, constitute the contract between the depositor and the cotton-press company. If conceded, it would narrow the controversy to a construction of the language of these receipts, and a determination of the effect of the transfer of them to the carrier in exchange for a bill of lading, and the subsequent surrender of same to the compress company for a different receipt. This presents altogether too narrow and contracted a view of this case. In order to determine the character and extent of this obligation concerning insurance, we must look to the course of business between the compress company and the depositors of cotton, its relations to the cotton buyers and cotton shippers at Memphis, its relations, contractual or otherwise, to the carriers who issued bills of lading upon its dray receipts, and the representations concerning insurance made by its agents and officers to those doing business with it, and especially to Bowles and Sons, the agents of complainant and the depositors of this cotton.

The evidence establishes that at the date of this transaction, and for several years previous, the railway companies had no rate for compressed cotton. The rate was exclusively for uncompressed cotton in bales. The carriers were accustomed in their bills of lading to stipulate for the privilege of compression at their own expense. For many years the defendant compress company had had an absolute monopoly at Memphis of the compression business. During this time it had contracts with every railway entering Memphis, identical in substance with the one set out in statement of the case. Under their contracts each carrier contracted to give to this defendant all cotton shipped over its line for compression.

The agreement by which the carrier contracted with the compress company to issue bills of lading upon its dray tickets was undoubtedly the result of an arrangement between the carriers and shippers and compress company, and was intended to facilitate the prompt issuance of bills of lading, and avoid delay while awaiting compression. The consignor of cotton was thus enabled, so soon as he could have his cotton drayed to the compress, to obtain a bill of lading, upon which he could draw for value of shipment against his consignee. This arrangement saved capital, and interest on capital, and greatly advanced the interests of buyers of cotton on Memphis market.

The fourth clause in the compression contract with the Newport News and Mississippi Valley company, constituting the compress company the agent for the carrier for the receipt of cotton, is the important feature of this contract. It was an essential part of the arrangement by which the carrier accepted a delivery at the cotton-press as a delivery to it, and by which the consignor assented to the stipulation permitting the carrier to have all cotton intrusted to it for transportation compressed before shipment. This agency for any particular carrier could not, with reference to any particular lot of cotton, begin until the cotton had been received for compression, and for shipment over line of a designated carrier with whom a compression contract existed. Hence arose the permit system, under which no cotton was received into the compress (as a general rule) until a permit had been granted by the carrier controlling the particular press in which the shipper wished his cotton deposited. It is true that permits were not in every instance demanded, and it is likewise true that the depositor obtaining such permit was not thereby obligated to ship his cotton out over the line granting the permit. It was regarded, however, as indicating that the depositor expected to "route" his cotton out over the line granting permit. The obligation of the carrier to issue his bill of lading upon cotton so "permitted" into a particular press did not by the contract arise until the depositor's dray tickets were presented. These evidenced the fact that the compress company held the cotton for compression, and the carrier accepted the delivery to him of the dray receipts as a symbolical delivery of the cotton, though the cotton was actually in custody of the compress company, and was to remain there until compressed.

The liability of the carrier to the shipper unquestionably began when it issued its bill of lading. To protect itself, it contracted that the compress company should stand responsible to it as a bailee for hire, and that it should carry insurance covering the cotton against loss by fire while in its custody. It might have limited the obligation of the bailee to an insurance of its interest in the cotton from date of issuance of bill of lading, or to insurance against liability upon its bill of lading. In such case, if the insurance had issued in these terms, the owner's interest in the insurance would have depended upon the primary liability of the carrier to the owner by reason of some breach of carrier obligation. But the carrier did not limit the obligation of the compress company to a procurement of insurance protecting only its insurable interest. In the same terms by which the compress company contracted to compress all cotton, it contracted to carry insurance upon all cotton in its presses for compression. Its contract was that it should "compress all of said cotton, and shall insure the same for the benefit of the first party." The cotton itself was to be insured,—for the benefit of the carrier, it is true. But a carrier has such an insurable interest in goods intrusted to him for carriage, that it may insure not only its interest or its liability, but the whole value of the goods. And in such case it may collect the whole value, and after reimbursing itself for its special loss, it will hold the surplus in trust for the owners: *Wood on Fire Insurance*, sec. 294; *Home Ins. Co. v. Baltimore Warehouse Co.*, 98 U. S. 541.

An insurance for the benefit of a carrier upon the goods in its custody, not limited to an insurance of its liability or interest, is an insurance of the whole value, and one in which the owner has an interest. The case of *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 541, is an instructive and well-reasoned case, and meets our approval. The insurance in that case was taken out by warehousemen against loss by fire "on merchandise their own, or held by them in trust, or in which they have an interest or liability," contained in a designated warehouse. It was held that the policy covered the merchandise on storage itself, and not merely the interest or claim of the bailee. The assured was allowed to recover the entire value, holding the remainder, after satisfying their own loss, as trustees for the owners. The warehousemen were under no obligation to insure owner's interest, their warehouse

receipts containing, by requirement of charter, a statement that it "was not insured by the corporation."

Evidence was offered tending to show that the insurer and assured intended only to insure the interest or liability of the warehousemen. This proof was rejected upon the ground that there was no ambiguity; that the merchandise itself was insured, and not the interest of the assured; and these plain words could not be explained away by parol.

The case of *London and Northwestern Ry Co. v. Glynn*, 1 El. & E. 652, is a leading case much cited. The policy was for fifteen thousand pounds, "on goods their own, and in trust as carriers," in a certain warehouse. In an action on the policy it was held that, to the extent of the policy, the whole value of goods in the warehouse in the carrier's possession was insured by it, and not merely their interest in the goods, and that the carriers would be regarded as trustees for the owners of the amount thus recovered, after deducting their charges as carriers.

So in the case of *California Ins. Co. v. Union Compress Co.*, 133 U. S. 409, the policy was taken out by the compress company to cover cotton "their own, or held by them in trust or on commission." It was conceded that this policy covered owner's interest; but the contention was, that railway companies which had issued bills of lading upon the cotton while in the compress, and which had been held liable, as carriers, for the value of the cotton (the fire being result of negligence of carriers), were not beneficiaries under the policy. It was held by the court that the railway companies with outstanding bills of lading had an insurable interest in the cotton, and to that extent were the owners of the cotton which was held in trust for them by the compress company.

In the light of these authorities, we are of opinion that the contract between the Newport News and Mississippi Valley Railroad Company and the Merchants' Cotton-press and Storage Company imposed an obligation upon the latter to insure all cotton in their presses against loss by fire, and that this obligation was imposed in such broad and unambiguous terms as to require insurance upon the full value of the cotton, and covering every interest in such cotton.

The compress company was under no duty to insure owner's interest, unless this contract imposed the duty and furnished the consideration. That it regarded this obligation as imposed would seem to be indicated by the terms of its policies of in-

insurance on cotton in press No. 4. This insurance amounted, at date of this loss, to three hundred and one thousand dollars, and was in about forty different offices. All of this insurance was (in so far as the written parts of the policy show) in the same terms and upon same interest, and was in these words:—

“On all cotton in bales received by them as agents, for the benefit of railroads, transportation lines, or owners, in the boundaries of the Merchants' Cotton-press and Storage Company's west navy-yard compress, situate and bounded as follows: East by the west line of Fulton Street, west by the Mississippi River, north by Auction Street, and south by Market Street. The liability of the insurers is to begin on the receipt of said cotton on premises of the assured as herein described, for compressing, and is to cease and terminate when removed from the platforms of the Merchants' Cotton-press and Storage Company for transportation.”

In express terms, these policies covered “all cotton in bales received by them as agents,” and for the benefit of railroad or owner. We attach no importance to the disjunctive “or.” The clear contract was to insure the cotton itself in the hands of the assured as agents; whether agents for railroads, transportation lines, or owners, it was alike insured, and for the benefit of these different classes of persons having insurable interest. There is no ambiguity in the policies, and evidence offered to show an understanding limiting the plain and obvious meaning of the written contract of insurance was not admissible, and was properly rejected: *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 418; *Hough v. Peoples' F. Ins. Co.*, 36 Md. 398; *Fire Ins. Ass'n v. Merchants' etc. Co.*, 66 Md. 338; 59 Am. Rep. 162.

That this obligation was imposed upon the compress company primarily to secure the railway company itself cannot affect the fact that in securing its own protection it likewise secured the interests of owners. Many reasons might be suggested moving it to demand that the cotton itself, and not merely its own liability or interest, should be covered.

The obligation thus imposed upon the compress company to insure the cotton itself against any loss during the entire period of its custody explains the representations made by the officers and agents of that company concerning its liability to carry insurance. It accounts for and explains its

representations — made orally and in writing, and printed upon its dray tickets — that cotton was insured for benefit of owners; and the finding of the jury that it represented that cotton was so insured while in its press is abundantly supported. This obligation was co-extensive with its custody. It was not limited by the life of the dray ticket. It was not affected by the issuance of the bill of lading. The actual possession of the cotton remained with the compress company. The effect upon the possession of the compress company of the issuance of a bill of lading while the cotton was in fact in the custody of the compress company was discussed in *California Ins. Co. v. Union Compress Co.*, 133 U. S. 415. What was there said is so applicable that we quote a paragraph: "As to the suggestion that by the bills of lading the possession of the cotton was transferred to the railroad companies, and that the policy was avoided thereby, the answer is, that the cotton was still in the hands of the plaintiff, in its actual possession, and upon its premises. At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the plaintiff, retaining actual physical possession of it, did not lose the right to effect insurance for its own benefit, and as bailee or agent, for the protection of the railroad companies. All that the railroad companies acquired was the right to ultimate possession, which passed to them by the transfer to them by the original depositors of the cotton receipts given by the plaintiff."

5. What is the liability of the Newport News and Mississippi Valley company by reason of the failure of the cotton-compress company to carry insurance sufficient in amount to cover full value of owner's interest? Was this railway company under any obligation as to insurance? The chancellor, on the facts, and upon a construction of its contract with the compress company, reached the conclusion that "the railroad company, by its contract with the compress company, in express terms assumed this obligation, and appointed the latter its agent to carry it out."

Unless the imposition of an obligation upon the compress company is the same thing in law as an express assumption of a like obligation, then this conclusion is not to be sustained. Nowhere in that contract does the railway company assume that it is under any obligation concerning insurance. Neither are we able to give any such construction to this contract as

constitutes the compress company the mere agent of the railway company in carrying insurance. If the carrier was, by law or by contract with shippers, obligated to carry insurance, then it would not escape responsibility by showing that it had required the compress to do what it was bound to do. It could not thus throw its duty upon another. The liability of the Newport News and Mississippi Valley company was the liability of a carrier, not the technical liability of an insurer. After bill of lading issued, it was not liable for a loss by fire, unless the result of negligence. This liability of a carrier, modified or not by fire clause, was one which it could carry or insure against. It was under no obligation whatever — this contract out of the way — to carry insurance, either upon its own liability or covering owner's interest. In view, however, of its own liability, it was a wise and reasonable precaution to require the compress company to carry insurance for its benefit. That this contract bound the compress company to insure the cotton itself, and not merely the carrier's responsibility, and thus such insurance would incidentally inure to the benefit of owners, affords no reason whatever for holding the carrier liable for the failure of the cotton-press company to fully carry out its obligation. The voluntary imposition of an obligation of insurance incidentally beneficial to owners of cotton is not in law or reason the same thing as the assumption of an obligation of insurance. The failure of the cotton-press company to carry such insurance may result in incidental damage to owners; but unless the railway company was under some obligation to insure, or that the compress company should insure, no right of action exists in favor of owners against it. There is no privity between the railway company and owners with respect to insurance. If it could be shown that the railway company had represented to shippers that cotton, while awaiting compression, was covered by the policies of the corporation employed by it to compress same, and such shipper, in reliance upon this representation, had accepted a bill of lading giving the carrier a right to have the cotton compressed, and had not, by reason of these representations, taken out insurance for himself, then an action would lie upon such facts. But no such case is made here. The most that can be said is, that the general purport of the contract was known to shippers, though these contracts were private, unregistered instruments, and manifestly not intended by the carriers to influence or affect the action of shippers

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as to insurance. But assuming that this complainant knew the precise terms of this contract, in what way is he to draw from it the conclusion that in case the compress company fails to insure, he may fall back upon the railway, because the railway has imposed voluntarily the duty of insurance upon the compress company? The agency of the compress company for the railway company in no way related to insurance. The body of this contract related to the terms and conditions upon which compression of cotton should be carried on for the railway company. With respect to this we must regard the compress company as an independent corporation, carrying on the business of compression for all who demanded its services. The railway company, as a large customer, required, as a condition upon which it would do business, that it should carry insurance. This was an obligation imposed upon the compress company, and not one assumed by the railway company to be executed by the former as agent for the latter. No other relation existed between the railway company and the compress company than shown by the written contract. This the jury have expressly found in response to the ninth issue. We find no reason for doubting this fact.

The compress company was regarded by all who had dealings with it as the only obligated party as to insurance. The bill nowhere charges an obligation, imposed by law or assumed directly or indirectly, by the carrier to insure, or cause to be insured, the interest of shippers. As stated in a foregoing part of this opinion, the relief which seems to have been contemplated by the pleader was a mere substitution of complainant to the rights and equities of the railway company under its contract with the compress company. That these contracts between the several carriers and the cotton-press company tended very directly to suppress competition and to build up and sustain a monopoly, we have no doubt; but that the monopolistic tendencies of these arrangements should have the effect of imposing an obligation of insurance not otherwise deducible from the contracts is not so clear or understandable.

Whatever loss complainant has sustained by failing to protect itself by its own insurance was wholly due to reliance upon the representations concerning insurance made by the compress company. The railway company entered into no direct obligations with owners concerning insurance, and made no representations, misleading or otherwise, on the sub-

ject. The obligations and representations of the compress company were not the obligations or representations of any authorized agent of the railway company, and there is nothing in this record which entitles complainant to any decree whatever against the railway company.

6. We come now to a consideration of the damage resulting to complainant by the breach of the obligation of the cotton-press company to carry insurance sufficient to cover full value of the cotton destroyed by fire. To the extent that it took out policies of insurance in good and solvent companies, in terms covering owners of cotton against loss or damage by fire until actual delivery to the carrier, it has complied with its obligation. As to such insurance it is a trustee for the owners, and as trustee it is bound to make proofs of loss, and institute necessary proceedings for collection.

Assuming that the insurance in force shall be collected and distributed *pro rata*, it will leave about four sevenths of the value uninsured by policies carried by the warehousemen. Is the defendant liable for this uninsured loss? This will depend upon the legal effect of a contract to carry insurance. A contract to carry insurance, or to cover with insurance, or a representation to a depositor that his deposit is insured, is very different in its legal effect from the absolute liability of an insurer. In the latter case the action would be upon the risk or policy for the value of the property destroyed, if within the amount of the risk. In the other cases the action would be for such damage as resulted from breach of the obligation to carry insurance. The measure of damages may in both cases be the same, — the value of the property destroyed. The difficulty in this case arises from the fact that complainant at the time of this loss was covered by a marine risk in the Insurance Company of North America, containing a fire clause covering "goods on shore prior to shipment" for ten days. That this risk covered this cotton at time or loss is not disputable. Prior to the bringing of this suit an amount of money equal to the full value of the cotton burned, plus ten per cent (that being the terms of the policy), was paid over to complainant, and a paper executed, styled in the record a "borrowed and received note." This document is in following words: —

" Boston, Mass., January 23, 1888.

" Borrowed and received of the president and directors of the Insurance Company of North America, of Philadelphia, Penn-

sylvania, the sum of twenty-two thousand thirty-seven dollars and sixty-nine cents (\$22,037.69), being a loan pending the investigation and determination whether the loss of four hundred and thirteen (413) bales of cotton, being part of a lot of five hundred bales marked [L] K, 1—500, shipped by William Bowles and Sons, Memphis, under a bill of lading of the Indiana, Bloomington, and Western Railway Company, dated Memphis, November 16, 1887, — said cotton reported burned at Memphis on or about November 17, 1887, — is a loss for which the carrier should be held liable; and if the carrier should be held liable, the undersigned agrees to return to the said president and directors the amount thus loaned when and to the same extent same shall be recovered from the carrier.

[Signed]

“LANCASTER MILLS,

“By HARCOURT ARMORY, Treas.”

The chancellor, in speaking of this defense to this suit, thus states the issue presented by this receipt: “The only question for judgment between the parties to this suit is, whether the transaction between the complainant and the Insurance Company of North America is a payment of this loss. If it is, the defendant’s breach of duty and of contract has not damnified it, and there can be no recovery here.”

Upon a construction of this receipt, and upon the authority of the case of *Inman v. South Carolina R’y Co.*, 129 U. S. 129, the chancellor reached the conclusion that this was not intended as a payment, but as a mere loan pending determination of the liability of the other parties supposed to be primarily liable for the loss. It would seem that if the Lancaster Mills, not relying upon the obligation of the compress company to carry insurance, had for itself procured other insurance in good and solvent companies, it would not be heard to say that it had been damnified by the failure of the defendant to do for it what it had done for itself. It is not, however, necessary to determine this, for we are convinced that the transaction between the Insurance Company of North America and the complainant, and evidenced by this receipt, is in fact and law a payment and satisfaction of the loss sustained by the burning of this cotton. The substance of this transaction is, that the insurer has paid the amount of its liability under the policy, subject alone to be repaid upon the contingency that the assured shall recover same from the carrier as being primarily liable. The precaution taken in calling it a loan was doubtless due to a fear that payment might

affect the right of the insurer to the benefit of a recovery against the carrier.

This precaution cannot change the fact that the assured has been paid, and that this payment is to stand, unless a liability shall be fixed upon the carrier, in which case the recovery from the carrier is to inure to the benefit of the insurer. The precaution was unnecessary. If the liability of the insurer was secondary, and it pays the loss, it is substituted to the rights of the assured against the party primarily liable, and may maintain a suit in the name of the assured for its benefit.

If the carrier or compress company is, as between it and the insurer of the owners, primarily liable, then an action in the name of the assured may be maintained for the benefit of the insurer, and the fact of payment will not affect the recovery. This we expressly decided at this term in the case of *Louisville etc. R. R. Co. v. Manchester Mills*, 88 Tenn. 653.

The case of *Inman v. South Carolina R'y Co.*, 129 U. S. 129, is not in any way in conflict with the conclusion we reach as to effect and meaning of this borrowed and received note. In that case it appeared that cotton in the custody of a railway company was destroyed by fire. The carrier's bill of lading stipulated that it should have the benefit of any insurance held by owner on goods destroyed by fire while in its possession. On the other hand, the owners held open policies of insurance on the burned cotton, which provided the assured should, in case of loss, transfer to the insurer his claim against the carrier, and providing that the insurance should be forfeited in case any agreement was made by the assured, whereby the insurer's right to recover of the carrier was released or lost. The owners filed proofs of loss, and their open policy was reinstated for original amount. They then entered into an agreement to prosecute their claim against the carrier as the party primarily liable, and the insurer agreed to allow interest on the claim until collected.

The court held that this stipulation did not amount to a payment; that the policies were not available to the carrier, inasmuch as the liability of the insurers depended upon the condition of resort over against the carrier. It was also held that the insurers, under their contract, had the right to require the assured to proceed first against the carrier, and to decline to indemnify them until the question of the carrier's responsibility was first settled. That case and this are totally un-

like, both with respect to the fact of payment (for no money was paid or loaned to the assured), as well as in the more important distinction that there the carrier's liability was primary as between it and the insurer. So we hold, — 1. That in point of fact the complainant has received payment for its loss from its own insurer; 2. That this fact of payment would not prevent the maintenance of a suit for the benefit of the insurer of the owner in the name of the assured, provided the loss is one which the defendants ought to have paid as between them and the insurer of the owners. If the liability of defendants, or either of them, was a direct one, — as for negligence, or by contract for the absolute "safe-keeping" of the cotton, — then the liability of defendants would be primary as for a loss proven or presumed to have been caused by them. In such case the insurer of the complainant would be subrogated to the right of the assured against the party primarily liable. This distinction is very clearly and forcibly illustrated in the case of *North British Ins. Co. v. London, L., & G. Ins. Co.*, L. R. 5 Ch. Div. 569.

As this case has been much relied upon by the learned counsel for complainant, we briefly state the facts of the case. The case was this: A firm of warehousemen "being, by express agreement, or a local custom of London," liable for any loss or damage which occurred to grain warehoused with them, for their own protection took out policies on grain in their custody. The owners of certain grain so warehoused, although they had the primary liability of the wharfingers, for their better protection took out policies in another company upon their interest in the same grain. A loss occurred. The wharfingers' companies and the bailors' companies contributed to a fund to reimburse the warehouseman, who had paid the loss to the owners of the grain. The suit was one between the respective companies to determine how the loss should be borne between themselves. It was held that the wharfingers' companies were liable for the whole loss, notwithstanding there was the usual clause requiring contribution where there was double insurance. The decision was rested upon the ground of the primary and absolute liability of the warehouseman to the owner of the goods in his custody. If the wharfinger had taken out no insurance, and the insurer of the owner of the grain had paid the loss, it would have been substituted to the assured's right of action against the wharfinger, who was absolutely and primarily liable. The ware-

Houseman had by his insurance protected himself against this primary responsibility. It was held, therefore, not to be a case of double insurance, but of separate insurance upon entirely different interests.

Here the essential fact which would entitle the insurer of the owner of the warehoused cotton to recover is missing; that is, the primary and absolute liability of either the carrier or compress company. The liability to the owner for a breach of obligation to carry insurance is not a primary liability as between the compress company and the insurer of the owner. By subrogation, the insurer obtains no right which the assured could not enforce. As the assured did for itself just what the compress company agreed to do for it, and having no right of action save for premiums, its insurer, who has paid the loss, has none. Whatever rights the insurers of the complainant have against the insurers of the defendant compress company for contribution must be settled in a suit between themselves. These insurers are not parties, and we therefore express no opinion upon this question.

The decree of the chancellor holding that complainant had not been indemnified by its own insurer was erroneous, and this results in dismissal of complainant's bill, with costs.

CARRIERS—LIABILITY UNDER SPECIAL CONTRACT.—A carrier may by special contract limit its common-law liability: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722, and note.

CARRIERS—LIABILITY AS WAREHOUSEMEN.—Where the shipper of goods is given a receipt therefor, containing on its back a contract limiting the liability of the carrier during transit, and the liability as a common carrier when the goods should reach their destination, and the owner permits the goods to remain at their destination until the carrier becomes liable only as a warehouseman, and the goods are afterwards destroyed by fire, the receipt has spent its force and is no longer material, and the liability of the carrier must be determined by the rules of law applicable to warehousemen: *Union Pacific R'y Co. v. Moyer*, 40 Kan. 184; 10 Am. St. Rep. 183, and cases cited in note; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; which does not include liability for losses occasioned by accidental fires: *Mobile etc. R. R. Co. v. Prewitt*, 46 Ala. 63; 7 Am. Rep. 586, and note 591, 592. But compare *Bancroft v. Merchants' Despatch Trans. Co.*, 47 Iowa, 262; 29 Am. Rep. 483; note to *Patton v. Magrath*, 31 Am. Dec. 554-556. See also note to *Schmidt v. Blood*, 24 Am. Dec. 146-148, upon the liability of a carrier as a warehouseman after the carriage has terminated.

WAREHOUSEMEN, CARE REQUIRED OF.—Warehousemen are bound to use only ordinary care, being considered merely ordinary bailees for hire: Note to *Schmidt v. Blood*, 24 Am. Dec. 145; *Turrentine v. Wilmington etc. R. R. Co.*, 100 N. C. 375; 6 Am. St. Rep. 602. Warehousemen are not insurers

against loss by accidental fire: *Aldrich v. Boston etc. R. R. Co.*, 100 Mass. 31; 97 Am. Dec. 74; and are not liable for any losses by fire not attributable to their lack of ordinary care: *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 429, and foot-note; note to *Schmidt v. Blood*, 24 Am. Dec. 155.

WAREHOUSEMEN — BURDEN OF PROOF IN ACTIONS AGAINST. — In actions by the owner of goods against a warehouseman, to whom he has intrusted them, for their loss or injury, the better rule seems to be, that the burden is upon the plaintiff to show negligence upon the part of the warehouseman: Note to *Schmidt v. Blood*, 24 Am. Dec. 150-153; *Denton v. Chicago etc. R. R. Co.*, 52 Iowa, 161; 35 Am. Rep. 263; *Olafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Willet v. Rich*, 142 Mass. 356; 56 Am. Rep. 684.

CONTRACTS — USAGE. — A usage, if known to the parties to a contract to which it relates, is obligatory, and unless excluded by the terms of the contract, enters into and forms a part thereof, as much as though it had been written therein: *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, and note; and evidence of usage may be admitted to explain a written contract: *Smith v. Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627, and note 632, 633.

INSURANCE — BAILMENT — INSURABLE INTEREST. — "The law seems to be well settled that a person having goods in his possession as consignee on commission may insure them in his own name, and in event of loss, recover the full amount of the insurance, and after satisfying his own claim, hold the balance as trustee for the owner": Note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 515, 516, where it is also stated that where a consignee or bailee accepts a consignment with instructions to insure, he will be liable for the full value of the goods upon their loss, should such instruction be not obeyed.

SUBROGATION. — To justify the application of the doctrine of subrogation, a person must have paid something for which another was in equity primarily liable: *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220, and note; see note to *Etna Fire Ins. Co. v. Tyler*, 30 Am. Dec. 102.

ELECTRIC RAILWAY COMPANY v. SHELTON.

[89 TENNESSEE, 422.]

NEGLIGENCE, CONCURRENT, OF TELEPHONE AND ELECTRIC RAILWAY COMPANY. — While it is primarily the duty of a telephone company to see that its wires are in a reasonably safe and sound condition, and protected against the contingency of falling, it is also the duty of an electric company using a trolley-wire to protect it from the same contingencies; and if, through the negligence of the telephone company, one of its wires falls across the trolley-wire of an electric company, and because of the latter being unguarded, the telephone wire conducts a current of electricity from it, whereby a horse coming in contact with the wire is killed, both companies are answerable to the owner of the animal, because the negligence of both concurred in inflicting the injury

Steger, Washington, and Jackson, for the railway company.

Vertrees and Vertrees, for the telephone company.

J. L. Nolen, for Shelton.

TURNEY, C. J. Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley-wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley-wire, and while resting on it, the horse came in contact with it, and was instantly killed. There was no guard-wire over the trolley-wire. The case was tried by the circuit judge without the intervention of a jury. The condition of the telephone-wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence, and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley-wire was in like manner protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley-wire, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and having failed to do so, are liable.

Affirmed.

NEGLECTANCE — JOINT LIABILITY. — Where the concurrent negligence of several parties has resulted in injury to another, they will be held jointly

and severally liable for such injury: *Consolidated etc. Co. v. Kayser*, 134 Ill. 482; 23 Am. St. Rep. 683, and note; *Chaff etc. E'y Co. v. McWhorter*, 71 Tex. 256; 19 Am. St. Rep. 755, and note; *Village of Casterville v. Coet*, 129 Ill. 152; 16 Am. St. Rep. 243, and extended note; *Nashua etc. Co. v. Worcester etc. R. R. Co.*, 62 N. H. 152.

DICKLE v. ABSTRACT COMPANY.

[89 TENNESSEE, 481.]

MAKER OF AN ABSTRACT OF TITLE TO REAL PROPERTY, guaranteed by him to be correct, is answerable in damages to the purchaser of such property, who relied upon the abstract, and refused to purchase without it, if recorded conveyances are omitted therefrom to his injury, though the abstract was made at the request and expense of and delivered to the owner of the property, who thereupon delivered it to the intending purchaser for examination.

Stokes and Stokes, for Dickle.

A. N. Miller, for the abstract company.

TURNER, C. J. Complainants purchased from Bowman, a resident of California, at the price of two hundred dollars per acre, a tract of land, represented to contain twenty-one acres and thirty-six poles, in Davidson County.

Complainants declined to purchase until they were furnished with an abstract of title. Bowman thereupon applied to defendants to make the abstract, which was done, and Bowman paid for it. They delivered the abstract to Bowman, and guaranteed it to be a true and perfect abstract of the title. On being furnished with the abstract, which showed the title to be in Bowman, complainants made the purchase on the faith of it. It subsequently developed that two conveyances, embracing about four acres of the land, had been made, but were not noticed in the abstract. The deed from Bowman to complainants was prepared by the abstract company. Such are the substantial allegations of the bill, which is brought to have the abstract company account.

There was demurrer, because the bill does not allege fraud, and there is no privity of contract between complainants and defendants. It was not necessary to allege fraud; a statement of facts is all that is necessary.

It is clear from the bill that complainants relied upon the abstract and the guaranty of its correctness, and would not purchase without it. The abstract company held itself out as competent to do the work, and it is well understood that pur-

chasers rely upon the work of such corporations as security for the perfectness of title, and expect them to point out any defects. Such was the case here. Complainants declined to purchase except upon an abstract.

To furnish abstracts of titles is a business. Parties undertaking it assume the responsibility of discharging its duties in a skillful and careful manner. Patience in the investigation of records is the main capacity required. There is no professional opinion. The agent has only to furnish the facts from the register's office, without concern for their legal effect. Upon the facts furnished, the purchaser must determine for himself on their sufficiency. The abstract company collects the evidence, and for such collection it is entitled to its fee. If it makes a mistake or oversight, as in this case, it must respond to the injured party.

The payment for the four acres already conveyed was the result of the unskillful work of the defendant. Holding itself out to the public as competent and skillful, it must be so, or supply the want by answering for the loss it brings about.

The allegations of the bill clearly make a privity of contract between the purchasers and the defendant. Upon the work of the latter depended the acceptance or refusal of the offer to sell.

Decree sustaining demurrer is reversed, and cause remanded for further proceedings.

ABSTRACTS OF TITLE — Abstractors are in confidential relation with their employers, and are held strictly responsible for the trust reposed in them: *Vallette v. Tedeno*, 122 Ill. 607; 3 Am. St. Rep. 502. In the employment of an agent, the principal bargains for the disinterested skill, diligence, and seal of the agent: *Davis v. Hamlin*, 108 Ill. 39; 48 Am. Rep. 541.

There was a difficulty in holding the defendant liable, in the principal case, which does not seem to have been fairly met, or at all considered by the court. So far as appears from the opinion, the person in whose favor the action was brought did not apply to the searcher of records for the abstract of title, nor was he in any respect brought in any contract relation with him. Undoubtedly the searcher was liable to the person who employed him for any negligence, or for want of the skill and ability requisite to the performance of the duties which he undertook to discharge. But, as a general rule, where a liability arises out of contract, or out of a failure of a person to perform something which he has agreed to do, none but the parties to the contract can maintain any action for the breach thereof, or for negligence or want of skill in its performance. Upon this principle, attorneys at law making mistakes in the examinations of titles have generally been held liable only to their employers, and not to third persons who may happen to act on the certificate or opinion given: *National Savings Bank v. Ward*, 100 U. S.

195; *Fish v. Kelly*, 17 C. B., N. S., 194; Wharton on Negligence, sec. 339-341. Upon principle, we do not see why the rule thus applied to attorneys is not equally applicable to searchers of records who do not happen to be also attorneys at law.

BANK v. CUMMINGS.

[89 TENNESSEE, 609.]

BANK — BILL OF LADING, WHEN JUSTIFIED IN DELIVERING. — If a bill of lading is attached to a time draft, the transaction ordinarily implies a sale upon credit, and that the bill of lading is retained only to secure the acceptance of the draft, and is to be delivered upon such acceptance, unless there are instructions to hold until payment, or circumstances indicating that the bill is to be held to secure both acceptance and payment.

BANK — BILL OF LADING TAKEN TO ORDER OF CONSIGNOR, DELIVERY OF, WHEN NOT JUSTIFIED. — If bills of lading, taken to the order of the consignor, with sight time drafts thereto attached, are indorsed to the cashier of a bank, through which they were to be transmitted for collection, there is no presumption of any authority on the part of the bank to surrender the bills of lading upon acceptance of the drafts, or otherwise than upon their payment; and if the bank makes such a delivery, it is unauthorized, and does not pass the title to the property described in the bills of lading.

BILLS OF LADING, DELIVERY OF WITHOUT AUTHORITY. — A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery without such payment; and one thus acquiring a bill of lading indorsed in blank, though acting in good faith in the regular course of business and paying value, acquires no title as against the principal.

BANK — LIABILITY OF, FOR BILLS TRANSMITTED TO AN AGENT FOR COLLECTION. — A bank receiving a bill for collection, payable at a distant point, and which must therefore be transmitted to that point for collection, is thereby impliedly instructed to send it to a suitable agent at the place of payment for collection, and such agent, when selected by it, becomes the agent of the owner, for whose negligence the bank cannot be held answerable.

BANK RECEIVING DRAFT OR CHECK IN PAYMENT, WHAT IS NOT. — If drafts are received by a bank, after which the sender authorizes the bank to fill up a check for the amount of such drafts, and the bank thereupon stamps them as paid, and credits their amount to the account of a depositor, and sends the drafts and the check to its correspondent, with instructions to surrender the drafts on payment of the check, and thereupon the check is dishonored, and both it and the drafts are returned to the bank, it has a right to charge back to such depositor the amount with which he was so credited, because the bank cannot be regarded as having received the drafts in payment.

Lamb and Tillman, and Padgett and Figures, for the bank.

J. H. Holman and Carter, for Cummings.

LURTON, J. The questions for decision arise upon the cross-bill of Cummings and Bledsoe against the complainant in the original bill. The firm of Cummings and Bledsoe were dealers in grain and produce at Petersburg, Tennessee, and did their banking with the Second National Bank of Columbia, Tennessee.

Between July 26, 1887, and August 4, 1887, they shipped by rail five car-loads of wheat to Atlanta, Georgia, being part of a larger quantity contracted to be sold to the Tollison Commission Company, of that city. Five separate bills of lading were taken, one for each separate car, "to the order of Cummings and Bledsoe, or assigns," with directions thereon to "notify Tollison Commission Company." Against each shipment a draft was drawn by the consignors upon the Tollison Commission Company, and payable to Cummings and Bledsoe, or order. These five drafts, with the bills of lading pinned thereto, were left with the Columbia bank, entered upon a deposit ticket as if for deposit as a cash item. The drafts were stamped with the indorsement: "For deposit only, to credit of Cummings and Bledsoe." The bills of lading were indorsed: "Pay to order of George Childress." No special instructions accompanied these drafts when left in the Columbia bank, other than a direction on the margin of each draft in these words: "By request of parties, draw through Gate City National Bank, Atlanta, Georgia."

These drafts were not discounted by the bank, nor was credit given for them upon the deposit account of Cummings and Bledsoe. They were entered as having been received for collection, and at once transmitted according to the written instructions on them to the Gate City National Bank, Atlanta, for collection, each draft being stamped with the indorsement: "Account of Second National Bank, Columbia, Tennessee." George Childress, to whom the bills of lading had been indorsed by Cummings and Bledsoe, was the cashier of the transmitting bank. Without any indorsement by Childress these bills of lading were transmitted pinned to the drafts, and no direction was given as to whether the bills were to be surrendered upon acceptance by the drawees of the drafts, or held as a security for the payment of the drafts. The drafts were all time drafts, being payable three days after sight. The drafts were, upon receipt by the Atlanta bank, presented to the Tollison Commission Company for acceptance, and upon acceptance, the unindorsed bills of lading

were surrendered to the acceptors. The wheat was delivered by the carrier to the Tollison company. None of the drafts were paid at maturity, and, after protest, were returned to the Columbia bank as worthless, the wheat having been disposed of and the drawee being insolvent.

Cummings and Bledsoe, by their cross-bill, seek to hold the bank at Columbia responsible for the amount of these five drafts. The first ground upon which liability is sought to be fixed is based upon the charge that these drafts were deposited as cash items, and credited to their account as such, and thereby became the property of the bank; that the drafts were well secured by bills of lading indorsed to order of its cashier, and the security, having been surrendered by negligence of its agent, acquits them of all responsibility as indorsers of the drafts. The facts do not support this contention. The drafts were not discounted by the bank, and were not entered to the credit of the drawers. There is evidence that some years before this transaction, the cashier of this bank, in order to secure their business, agreed to receive and collect checks and sight drafts without charge, and credit them as cash. This agreement did not extend to time paper, such as this was, and there is no proof that such paper was ever credited except as collected. Certainly these drafts were only received for collection, and so entered on the books of the bank.

It is next contended that the transmitting bank was instructed to hold the bills of lading until payment of drafts attached, and that the failure to give similar instructions when transmitted is such negligence as makes it responsible. It is not pretended that any such instructions were given concerning these particular drafts at the time they were left for collection. The contention of complainants in the cross-bill is, that theretofore they had given such directions concerning all their drafts with bills of lading attached. The weight of proof does not support this insistence. The conversations testified to by Mr. Cummings do not, as stated by himself, necessarily imply any such instruction. The bank's officers most positively deny any such directions, either orally or by letter. The burden of proof is upon Cummings and Bledsoe, and we agree with the chancellor in holding that they have not satisfactorily shown any such general instruction. This brings us to the question as to whether, in the absence of instructions, the bank at Atlanta was authorized to surrender the bills of lading upon acceptance of the drafts,

or whether the facts of the transaction, as indicated by the indorsements on drafts and bills, indicated the intent of the consignors to hold the bills as a security for the payment of the drafts.

It is well settled that when a sight draft is attached to a bill of lading for the merchandise against which the draft is drawn, the bill of lading is not to be delivered until payment. It is, however, equally as well settled that if the bill of lading be attached to a time draft, the transaction imports a sale upon credit, and that the bill of lading is only retained to secure acceptance of the draft, and is to be delivered upon acceptance, unless there be instructions to hold until payment, or circumstances indicating that the bill is to be held to secure both acceptance and payment: *National Bank v. Merchants' Bank*, 91 U. S. 92; 2 Daniel on Negotiable Instruments, secs. 1784 a, 1784 b.

But it is insisted that the fact that the bills of lading were taken to the order of the consignors, and indorsed by them to the cashier of the bank through which they were to be transmitted for collection, rebuts any implication arising from the fact that they were time drafts, and therefore sales on a credit, and conclusively shows an intent to hold the title as security for payment of the drafts drawn against the shipment.

Mr. Benjamin, after a thorough consideration of the question in the light of the English decisions, concludes that "the fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee": Corbin's Benjamin on Sales, sec. 565.

The same question was before the supreme court of the United States in a case where the bills of lading had been taken to the order of the cashier of the bank discounting the drafts drawn against the shipment, and Mr. Justice Strong, in delivering the opinion of the court, said: "These bills of lading, unexplained, are almost conclusive evidence of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts": *Dow v. National Exch. Bank*, 91 U. S. 631.

In the case of *Security Bank v. Luttgen*, 29 Minn. 366, the defendant, Luttgen, shipped flour to Baltimore to fill an order, taking bills of lading to their own order. Draft at thirty

days after sight was drawn against the shipment. This draft was discounted by the plaintiff, and the bill of lading indorsed in blank, and delivered with the draft to the bank. The draft and bill of lading attached were sent by the bank to its correspondent for acceptance. Upon acceptance, the bill of lading was surrendered to the drawees, who, becoming insolvent, failed to pay the drafts. The discounting bank thereupon sought to hold the drawer liable to it upon his indorsement. There was proof of an agreement that the bills of lading should not be delivered to the drawees until payment, but the court said that "the transaction itself, independent of the parol agreement, considered as a matter for merely legal interpretation, did not express or import a sale upon credit, or determine that the drawees were entitled to the bills of lading upon acceptance. The taking of bills of lading making the goods deliverable to the order of the shipper, rather than to the person for whom they are ultimately intended, has been considered almost conclusive proof of an intention on the part of the consignor to retain the *jus disponendi*, although subject to be rebutted."

Upon these authorities, we conclude that the bank at Atlanta had no authority to surrender these bills of lading upon acceptance. Though it had no instructions, yet the transaction on its face, as a mere matter of legal construction, bore an implication that the intent of the consignor was to retain the *jus disponendi* as a security for the payment of the drafts. Unless, however, the wheat could not be traced after delivery by the carrier, it was recoverable by the consignors.

A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery without such payment. The person thus acquiring a bill indorsed in blank has been held not to acquire any title to the goods as against the principal: *Stollenwerck v. Thacher*, 115 Mass. 224.

And third persons dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are chargeable with constructive notice, and acquire no better title than the drawee: *Farmers' etc. Nat. Bank v. Logan*, 74 N. Y. 568; *Heiskell v. Farmers' etc. Nat. Bank*, 89 Pa. St. 155; 33 Am. Rep. 745; *Dows v. National Exch. Bank*, 91 U. S. 631.

It is also questionable whether a delivery by the carrier

upon a bill of lading to the order of the consignor, and indorsed to order of the cashier of the transmitting bank, was a good delivery, the cashier never having indorsed the bills to Tollison & Co., or any one else. A carrier must deliver alone to the person named as consignee in the bill of lading, or to his order. This was not done: *The Thames*, 14 Wall. 98.

That the assignment of the bill of lading to the cashier of the Columbia bank placed the title of the wheat in him is clear. This, however, would not have prevented suit for the wheat, or an action against the carrier. Childress, in whom was the title, was but the agent of the vendors, and besides, the bank offered to take any legal step deemed advisable by the vendors. None was taken, either to recover the wheat or its value, or to hold the carrier liable, although one of the vendors went to Atlanta and consulted counsel. The question remains, Is the bank at Columbia responsible for the negligence of the bank at Atlanta in surrendering these bills of lading upon acceptance, and enabling the drawees to obtain and make way with the security? By the great weight of authority, the bank receiving a bill for collection, payable at a distant point, is impliedly instructed to send such bill to a suitable agent for collection at the place of payment; and such agent, when so selected, becomes the agent of the owner of the bill, and is not the agent of the transmitting bank: *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101; 35 Am. Rep. 691.

If the debt be lost by the negligence of the agent so selected, the right of action is in the owner of the paper, and not in the bank forwarding the paper: *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101; 35 Am. Rep. 691. The liability of the transmitting bank is only for its own negligence. There can be no question of negligence in the transmission of this paper to the Gate City National Bank, for this bank was designated by the drawers themselves. Having received no special instructions as to holding the bills of lading as security for payment of the drafts, they are not liable for neglect. If the transaction on its face imported an intent that the title of the wheat should be retained until payment of the drafts, and that this retention of the *jus disponendi* implied the impropriety of delivering the bills of lading, then the agent selected at Atlanta was as fully advised as to the legal construction inferable from the bills of lading as was the bank at Columbia. The duty of special instructions rested as strongly upon Cum-

mings and Bledsee as it did upon the agent for transmission. If the Columbia bank should have explained the legal inferences deducible from the state of the title to the bank at Atlanta, then the drawers should have given such explanation to the transmitting bank in the first instance.

One other question remains. The day after two of these drafts had been returned to the bank at Columbia unpaid, a check drawn by Tollison Commission Company against the Gate City National Bank was received by the bank at Columbia in a letter written by the Tollison Commission Company's president, explaining that the drafts had been returned through mistake, and authorizing the Columbia bank to fill up the blank in check for amount of the returned drafts. This was done, and the drafts stamped as paid, and transmitted to the Gate City bank with the check of the Tollison company, with directions to deliver the drafts to the Tollison company upon payment of its check. The check was dishonored, and it, with the drafts, returned to the bank at Columbia. When this check was received, it was regarded as good, and at once credited to the account of Cummings and Bledsee, and notice given them. When it was dishonored, it was charged back to Cummings and Bledsee. The contention is, that this was without authority; that having received the check in payment of the draft, the bank is bound to make the check good. The authority for this position is Morse on Banking, who says: "If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper up to him, it assumes the responsibility for the check proving good." This is not applicable to the facts of this case. The drafts were never surrendered to the party bound to pay them. The ground of the proposition stated by Mr. Morse is, that an agent for collection—as a bank—can receive nothing but money in discharge of paper held for collection. If a check is taken, and injury results,—as by the discharge of a drawer or indorser,—or the bank is unable to return the paper by reason of such unauthorized surrender, then the bank, having exceeded its authority, is liable for all consequences: Corbin's *Daniel on Negotiable Instruments*, sec. 1624.

Here the drafts were sent with check, to be delivered only on payment of check, and were at once returned upon dishonor of check. No injury whatever resulted, and there can be no doubt that the course of business between the bank

and Cummings and Bledsoe justified charging this check back to them, it having been by mistake passed to their credit.

Decree dismissing cross-bill affirmed, with costs.

BANKS — LIABILITY OF, FOR NOTES TRANSMITTED TO AN AGENT FOR COLLECTION. — The weight of authority is, we think, against the rule followed in the principal case. In a majority of the cases, banks, with which a customer leaves, for collection, his draft upon a party residing at a distance, have been held liable for the default of agents, to whom the draft was forwarded for collection: *Streisguth v. National etc. Bank*, 43 Minn. 50; 19 Am. St. Rep. 213, and note; *German etc. Bank v. Burns*, 21 Col. 539; 13 Am. St. Rep. 247, and note; *Allen v. Merchants' etc. Bank*, 22 Wend. 215; 34 Am. Dec. 289, and extended note; *Simpson v. Waldby*, 63 Mich. 439.

BANK RECEIVING DRAFT OR CHECK IN PAYMENT, WHAT IS NOT. — When the amount of a draft or check, left with a bank for collection, is credited to a depositor as cash, it may be charged back to him in case it proves worthless: *Rapp v. National Bank*, 136 Pa. St. 426; *Hamlet v. Commercial etc. Bank*, 132 Pa. St. 118.

WALLACE v. LINCOLN SAVINGS BANK.

[39 TENNESSEE, 630.]

CORPORATIONS — SUIT AGAINST DIRECTORS FOR MISMANAGEMENT, BY WHOM SHOULD BE BROUGHT. — A suit against the directors of a corporation for their negligence and mismanagement of its business should be brought by the corporation; but if it is disabled from suing, — as where the managing agents of the corporation, its officers and directors, are themselves to be defendants, or where the corporation wrongfully and willfully refuses to sue, — then a court of equity will entertain a suit by a share-holder, substituting him to the corporate right of action.

CORPORATIONS. — A STOCKHOLDER SUING THE DIRECTORS OF A CORPORATION FOR THEIR NEGLIGENCE AND MISMANAGEMENT AS SUCH must be regarded as suing for the benefit of the corporation; and its creditors and share-holders, innocent and guilty, as entitled to share proportionately in the benefits of the decree. He is not entitled to any preference or priority over other creditors or stockholders.

CORPORATIONS, REFUSAL TO SUE. — The mere refusal of a corporation to bring a suit will not authorize any stockholder dissatisfied with its decision to himself institute an action. It must further appear that the refusal was wrongful.

CORPORATIONS. — TO ENTITLE A STOCKHOLDER TO BRING A SUIT WHICH SHOULD HAVE BEEN BROUGHT BY THE CORPORATION, he must show that the majority of its board of directors had wrongfully refused to bring such action, where the corporation has not parted with its right to sue.

CORPORATIONS. — ASSIGNEE OF ALL ASSETS OF AN INSOLVENT CORPORATION, after such assignment, represents the corporation as well as its creditors; and unless he refuses to do so, is alone authorized to bring an action against the late directors of the corporation for their negligence and mismanagement of its affairs.

CORPORATIONS. — A STOCKHOLDER OF A CORPORATION, THOUGH HE HAS NOT REQUESTED THE CORPORATION OR ITS DIRECTORS TO BRING SUIT against the late directors for their negligence and mismanagement, may maintain an action on behalf of himself and the other stockholders and creditors, if, before the commencement of such action, the corporation made a general assignment for the benefit of its creditors, and its assignee, after being requested so to do, refused to institute any action.

CORPORATIONS. — A STOCKHOLDER OF A CORPORATION CANNOT MAINTAIN AN ACTION AGAINST ITS DIRECTORS FOR IMPROPERLY DECLARING AND PAYING DIVIDENDS, and thereby causing a deficit.

BANKS. — THE CASHIER OF A BANK IS BOUND TO EXERCISE REASONABLE SKILL, CARE, AND DILIGENCE in the discharge of his duties. If intrusted with the duty of making loan, he is not liable as a guarantor of the solvency of his transaction, nor responsible for an error of judgment, where he has exercised reasonable skill, diligence, and prudence.

DIRECTORS OF A CORPORATION ARE NOT ANSWERABLE FOR LOSSES resulting from loans made by its cashier, on the ground that they neglected their duties by intrusting to him the sole management of the affairs of the corporation without exercising any supervision over him, if he was not guilty of any want of care and prudence in making the loans or in taking steps to secure or collect them.

DIRECTORS OF A CORPORATION ARE NOT LIABLE FOR NEGLIGENCE IN NOT PREVENTING ITS CASHIER from making loans to himself, unless it is shown that the corporation sustained loss as a direct consequence of such negligence.

STATUTE OF LIMITATIONS. — A SUIT BY A STOCKHOLDER AGAINST THE DIRECTORS OF A CORPORATION to recover for injury suffered by it through their negligence and mismanagement cannot be maintained, if the right of the corporation to bring such suit is barred by the statute of limitations, because a share-holder can enforce only such claims as the corporation itself could enforce.

STATUTE OF LIMITATIONS. — DIRECTORS OF A CORPORATION ARE NOT TRUSTEES IN WHOSE FAVOR THE STATUTES OF LIMITATION DO NOT RUN; and a suit against them for malfeasance, misfeasance, or negligence in office, brought in equity by a stockholder, is subject to the same limitation as if it were an action at law by a corporation.

STATUTE OF LIMITATIONS. — SUITS AGAINST THE DIRECTORS OF A CORPORATION for injury suffered by it, through their negligence and mismanagement, fall within that clause of the statute of limitations providing the time within which actions may be brought upon contracts, because the relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties of his office, and an action for omission of such duty is an action for a breach of this implied contract.

CORPORATIONS — DUTIES AND LIABILITIES OF DIRECTORS. — Directors by assuming office agree to give as much of their time and attention to its duties as the proper care of the interests intrusted to them may require. If they are inattentive to those duties, neglecting to attend meetings of the board, and turning over the management of the corporate business to the exclusive control of other agents, they are guilty of gross negligence with respect to their ministerial duties, and liable, if

loss results to the corporation from breaches of trust or acts of negligence committed by those left in control, and which by due care and attention on their part such directors might have avoided.

CORPORATIONS. — THE DILIGENCE REQUIRED OF DIRECTORS OF CORPORATIONS in the discharge of their duties is that exercised by prudent men in their own affairs, being that degree of diligence characterized as ordinary.

CORPORATIONS. — WHAT CONSTITUTES A PROPER PERFORMANCE OF THE DUTIES OF A DIRECTOR is a question of fact, to be determined in each case in view of all the circumstances, the character of the corporation, the condition of its business, and the usual methods of managing like corporations.

CORPORATIONS. — BANK DIRECTORS ARE NOT EXPECTED to give their whole time and attention to the business of the corporation. The active management may be left to the cashier and other agents selected by the directors, whose duty in respect to such cashier and agents is to supervise, direct, and control them.

CORPORATIONS. — DIRECTORS ARE RESPONSIBLE FOR LOSS RESULTING from the wrongful acts of other directors, or of agents of the corporation, only when such loss was the consequence of a neglect of duty in the directors sought to be charged, either in failing to supervise the corporate business with attention, or in neglecting to use proper care in the appointment of such agents.

CORPORATIONS — DIRECTORS' LIABILITY — BURDEN OF PROOF. — In an action by a stockholder against the directors of a corporation to recover for losses suffered by it through their negligence and mismanagement, the burden is upon the complainant not only to prove the losses alleged, but to show that they were the consequence of the negligence and mismanagement of the directors.

BANKS — OVERDRAFTS. — IT IS NOT NECESSARILY NEGLIGENT, in the absence of a by-law or an order of a superior officer, for a cashier to pay the overdraft of a responsible customer; and therefore directors of the bank cannot be held liable by the mere proof that the account was overdrawn, and a loss sustained thereby.

CORPORATIONS. — DIRECTORS OF A BANK ARE NOT TO BE HELD LIABLE FOR promissory notes on the ground that they had been permitted to become barred by the statute of limitations, unless it appears that they were solvent assets, and that an injury resulted from the failure to bring an action thereon within the period allowed by such statute.

CORPORATIONS. — DIRECTORS OF A BANK ARE NOT HELD TO BE LIABLE FOR OVERDRAFTS BY CUSTOMERS who are people of character and of business integrity, though not having property from which payment could be coerced, where such overdrafts are not shown to have been authorized by the directors, nor are they shown to have had any actual knowledge thereof, though the facts of such overdrafts could have been ascertained from an examination of the entries upon the books of the bank.

CORPORATIONS — PRESUMPTION OF DIRECTORS' KNOWLEDGE. — A director in a suit between himself and the corporation, or those suing upon a corporate right of action, is not presumed to have knowledge of all that is shown by the books of the company. The presumption of knowledge attaching to a director applies only in suits between the corporation and a stranger.

Lamb and Tillman, and Cooper and Frierson, for Wallace.

Carmack and Woodard, J. H. Holman and Carter, and A. S. Marks, for the respondents.

LURTON, J. This is a bill by a share-holder and creditor of the Lincoln Savings Bank, in behalf of himself and all other share-holders and creditors, against such directors of the bank as held office at different times between the organization of the bank in 1870 and its suspension in 1886. The other defendants are the corporation itself, under its corporate name, and the trustee of the corporation under a general assignment for benefit of creditors made in August, 1886. The bill charges that the defendant directors, by their inattention, negligence, and mismanagement, have been guilty of a breach of trust, whereby the bank has been reduced to insolvency, its capital wasted, and the shares rendered worthless.

There was a decree in favor of complainant for the use of the corporation against several of the defendants, holding them liable for certain losses sustained through improvident discount, overchecked accounts, and neglect to bring suits upon matured paper. The decree has been appealed from by complainant and defendants. Such a bill cannot be maintained by complainant for his peculiar and personal benefit. The wrongs complained of do not especially affect his stock or his demands as a creditor. The negligence of the defendants was in the discharge of duties to the corporation as such; and the corporation, for such negligence, has a right of action. Primarily, therefore, such suit should be brought by the corporation in its corporate name; and only under peculiar circumstances will a creditor or stockholder be permitted by courts of equity to bring the suit which the corporation has failed to bring. But where the corporation is disabled from suing, — as where the managing agents of the corporation, its officers and directors, are themselves to be the defendants, or where the corporation wrongfully and willfully refuses to sue, — then, in either case, a court of equity will entertain a suit by a shareholder, substituting him to the collective or corporate right of action. In either case it is most obvious that the recovery must be for the benefit of the corporation, all its creditors and share-holders, innocent and guilty, sharing proportionately in the benefits of the decree. The learned chancellor was correct in holding that the decree obtained by complainant inured to the benefit of the corporation, and that complainant

was not entitled to any preference or priority over other creditors or stockholders. The assignment of errors on this point by complainant is therefore overruled.

The defendants were not in office at the time this suit was begun. The corporation was not therefore disabled from suing by being in the hands and under the control of the parties to be sued. It must therefore appear, before complainant will be suffered to carry on such a suit, that the corporation, or those authorized to represent it, have been requested to sue, and that they have wrongfully refused to bring the suit.

It by no means follows that the mere refusal of the corporation to bring a suit will authorize any stockholder dissatisfied with such decision to himself conduct the suit. A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such associations to bring suit upon every supposed wrong or injury to the corporation. If it were so, strangers could never know when a settlement, compromise, or adjustment was a finality if the matter was subject to be overhauled at the suit of any discontented share-holder. So a suit might appear so desperate, or be so expensive, or for good reasons impolitic, that directors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the courts will rarely suffer a share-holder to overturn such decision by entertaining his suit for the same cause of action. To authorize his suit, the refusal of the corporation to sue must appear to have been wrongful: *Morawetz on Private Corporations*, sec. 244.

The bill alleges and the proof shows that the president of the defendant corporation was duly requested to bring an action in the corporate name against the former directors for the cause of action stated in this bill. This he declined, because he did not deem the facts submitted to him justified such suit. This demand was not laid before the directors then in office, and they have never been requested to sue, nor have they declined to sue. The directors, not the president, represent the corporation. The failure to show that a majority of the board had wrongfully refused to bring such suit would be fatal to complainant's right to sue but for certain facts now to be stated.

In August, 1886, this bank was hopelessly insolvent, and, in that situation, a general assignment of all its assets was made to the defendant, Hancock, as trustee, for the benefit of

all creditors, any surplus to be paid over to the corporation. Hancock accepted the trust, and qualified as trustee. Subsequently, he was requested to bring this suit, and declined, deeming himself unauthorized. This right of action passed as an asset to the trustee: *Hume v. Commercial Bank*, 9 Lea, 744.

After the assignment, he represented the corporation as well as its creditors, and was alone authorized to have sued upon a corporate right of action. This point has been repeatedly settled by other courts: *Williams v. Hilliard*, 38 N. J. Eq. 376; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Jones v. Johnson*, 86 Ky. 530; *Savings Bank etc. v. Caperton*, 87 Ky. 306; 12 Am. St. Rep. 488; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

In the case last cited the suit was against the directors and officers of an insolvent national bank in the hands of a receiver appointed under the provisions of the national banking law. The receivers had refused to sue. The court held that the right of action was in him, and his refusal authorized a share-holder to present a bill in behalf of himself and all other share-holders, the receiver and the corporation being made defendants. The decision was not based upon any of the peculiar provision of the act of Congress concerning effect of appointment of a receiver, or liability of officers and directors of national banks, but was squarely planted upon the general principles governing courts of equity in such cases. We do not think that the trustee of an insolvent corporation would have so wide a discretion as to suing as exists in the directors of a solvent and going corporation. In the case of the refusal of the managers of a corporation, an appeal would lie to the general meeting of share-holders; and if in such refusal they did not represent the will of a majority, it could be then made to appear, and a board elected who could reverse their action. From the refusal of the trustee there was no appeal, save to a court of equity. The case presented on the face of the bill was not frivolous, but was so grave in character and important in amount as to have made it the duty of the trustee to have submitted the charges to the decision of a court.

This bank was organized in 1870, under a private charter granted by this state in 1869. The capital stock was one hundred thousand dollars, all of which was ultimately paid in. Some of the defendants were elected directors in 1870,

and by annual re-election continued in office until 1885 or 1886. Others served for very short terms, while still others held office for from one to ten years.

They are not charged with any sort of fraudulent collusion. Indeed, no intimation is found in pleadings or proof that any one of them profited directly or indirectly by any of the alleged acts of mismanagement or negligence. All of them were stockholders, largely interested in the success of the association, and all suffered equally with complainant by its disastrous failure.

The liability of defendants to the corporation is predicated alone upon the proposition that certain losses sustained by the bank during its fifteen years of business activity were the direct consequence of the negligence of defendants while directors. The principal fact constituting this alleged negligence is a charge that the board of directors abdicated their trust by failure to supervise the management, and turned over the entire control of the business of the bank to the unlimited discretion and unaided judgment of the cashier; that, as a consequence, the bank had sustained great losses through a series of unwise, indefensible transactions, engaged in by the cashier without the aid, advice, and supervision of those charged by their selection with the duty of exercising an intelligent judgment in the control of that officer. The allegation necessarily is, that these transactions, so disastrous in their consequences, would have been avoided, and these losses escaped, but for the negligence and inattention of defendants in office at the dates of the several transactions. The losses alleged to be a consequence of this breach of duty may be conveniently classified as follows: —

1. That there is an unexplained deficit of about forty thousand dollars, the proof of which consists in the fact that the liabilities of the corporation, including its capital stock of one hundred thousand dollars, exceeds in amount the nominal value of all assets, good and bad, by the sum stated. This difference between liabilities and nominal assets is charged to be a deficit for which defendants must account. The books of the bank are no part of the record. No balance-sheets are exhibited, and no expert testifies as to the state of the bank as shown by its books. There are many ways in which this deficit of nominal assets may be accounted for. Debts deemed worthless ought to be charged off to profit and loss; in which case they would no longer appear as an asset.

This, indeed, appears to have been done to the extent of perhaps twenty thousand dollars. But a more certain solution of this matter is found in the fact that 126 per cent has been paid out in dividends upon paid-up stock. A profit justifying such dividends was made to appear by carrying as solvent large amounts of paper held by the bank which subsequently turned out to be wholly or partially worthless. So real estate taken for debt continued to figure as an asset of the value of its cost to the bank, whereas large losses were subsequently sustained when sales were made.

Again, in the statements to the directors, made by the cashier, of the business of the bank, no overdrafts are shown. His habit was to deduct overchecks from aggregate amount due depositors. This was delusive, for large losses ultimately resulted from these very overdrafts. Thus it is a case where capital has been paid out in dividends, and the assets reduced below liabilities. Complainant does not seek a recovery of this deficit, or for dividends improperly paid. It is obvious that he could not, directly or indirectly, be allowed to again recover money already once paid him in the shape of dividends: *Turquand v. Marshall*, L. R. 4 Ch. 582.

In that case Lord Haverley said of a suit against directors by share-holders, in part originating in improper payment of dividends, "that this was a very singular claim, as in fact it was asking the directors to pay over again to the share-holders what they had already received as dividends."

The chancellor was clearly right in refusing to hold defendants to an account as to this so-called deficit. The second assignment of error by complainant is therefore overruled.

2. The bill charges that within a few years after organization over fifty thousand dollars of the capital appeared to have been invested in real estate; that ultimately losses approximating twenty thousand dollars were sustained by reason of this diversion of assets. The facts do not sustain this charge. The bank did, at one time, own real estate costing nominally fifty thousand dollars; but this was the result of foreclosure of mortgages and execution sales. The panic of 1873 and the hard times ensuing, together with local crop failures, operated to ruin large numbers of the bank's debtors. In some cases mortgages were taken, and in others suits were brought. It was deemed safe to bid the bank's debts upon

lands sold under execution and at foreclosure sales. For years following real estate steadily declined, and was almost unsalable. The bank held, hoping to save itself. Ultimately the losses complained of were realized. There is nothing in the evidence tending to show anything more than bad judgment in the management of debts, good when made, but imperiled by subsequent events. Indeed, the proof hardly makes out a case of error in judgment; for the probability seems to be, that in bidding the debts upon the lands and holding for a better market, the bank's officers did what the most prudent and sagacious would have done at the time and under same circumstances.

Complainants, however, insist that all the loans represented by this real estate were made by the cashier, and without the approval or knowledge of the directors or any committee, and that all the subsequent steps resulting in its acquisition were taken by the cashier, possibly with knowledge and approval of the president of the corporation, but without the knowledge or consent of the board of directors. This is perhaps true, for it is shown that the first board of directors by resolution gave the cashier exclusive charge of the loans and collections of the bank, and that down to perhaps as late as 1880 this responsibility was reposed exclusively in that officer, the directors during all that time rarely meeting, and having little if any knowledge of the business of the bank beyond what appeared in the annual statements made by the cashier to the directors and stockholders. Ordinarily this would constitute such gross negligence as to make directors responsible both for the criminal defaults and negligent acts of the cashier. There are circumstances, however, to which it may hereafter be necessary to refer, which much mitigate this apparent abdication of duty. Ignoring these circumstances, and treating this as responsible negligence, complainant can only fix liability upon defendants by first convicting the cashier of negligence in regard to these transactions.

A cashier is bound to exercise reasonable skill, care, and diligence in the discharge of his duties. If he fails in such skill, or omits such care, and the bank suffers damage as a consequence, he is liable. If intrusted with the duty of making loans, he is not responsible as a guarantor of the solvency of his transactions, or responsible for an error of judgment, where he has exercised reasonable skill, diligence, and prudence: *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. 805.

Complainant has not shown that there was any want of care or prudence in making these loans, or in the subsequent steps taken to secure or collect them. If the cashier is not chargeable with any want of care or skill about these matters, then it follows that defendants are not liable, for they, at most, can only be liable for losses resulting from his negligence in these matters. There was no negligence in the selection of the gentleman then filling the office of cashier. He bore a very high reputation as a business man of integrity and intelligence, and was better acquainted with the credit of the customers of the bank than any man in the county. We therefore concur with the chancellor in ruling that no liability attaches to any of defendants by reason of losses ultimately resulting from shrinkage in values which human foresight could not guard against.

3. The next loss with which it is sought to charge the directors is one of twenty thousand dollars, said to have resulted from loans made to the cashier, Hampton, and to the firm of Carloss and Hampton, of which he was a partner. Hampton began borrowing as early as 1873, either for himself or his firm. His notes were, from time to time, renewed, and other sums borrowed until the indebtedness of the two men reached the enormous sum of fifty thousand dollars in 1879. During this year the directors, for the first time, discovered these transactions. Hampton was himself a large shareholder, having in his own name something over ten thousand dollars in stock. Under the charter the bank was given a lien upon the shares of a borrowing stockholder for the security of his loans. It appears that the president of the corporation had authorized Hampton to borrow to the extent of his stock, it being then at a premium. With this exception none of the directors were aware of the fact that their cashier was borrowing from the bank; and all, including the president, were greatly surprised when, in 1879, the extent of his indebtedness was discovered. Hampton was regarded as a man of fine estate and rare financial capacity, and the bulk of the stock was taken by subscribers upon the understanding that he was to be made the cashier, and, as such, to have the management and control of the bank. After his election the first official act of the directory was, by resolution, to give him exclusive control of the discounts of the bank. No by-laws were adopted at any time by the share-holders, and none by the directors for their own government. None of the

directors, originally or subsequently elected, had had any experience whatever in the banking business. Confidence in Hampton's integrity and financial ability seems to have underlaid the action of share-holders and directors alike. A portion of the directors were country gentlemen, living remote from the location of the bank. Others were lawyers and merchants of Fayetteville, but all fully occupied with their personal affairs. The president of the bank, up to his death in 1885, was the late Colonel D. W. Holman, a lawyer of large practice, which very fully engaged his time and energy. He was allowed a small salary, and seems to have been much about the bank, much consulted by the cashier, and to have given the business of the bank a general supervision. Having died before the institution of this suit, we have not had the benefit of his evidence, but, from all that is shown, he only consented to the borrowing by Hampton of a sum equal to his stock, and was wholly ignorant of the subsequent large loans. Up to the discovery of these loans to Hampton and his partner, the directors had had few meetings, and knew little of the business of the bank. Its management was intrusted to the judgment and discretion of the cashier, with such general supervision as the president was able to give. The resolution intrusting the lending of money and discounting of paper to the discretion of the cashier did not authorize him to lend to himself. He could not represent himself and the bank at the same time, and his conduct in this matter is not to be defended, and was a clear breach of duty upon his part. So soon as these loans were discovered the directors resumed the general control and management of the bank. Hampton was in a short time superseded by a new cashier of high character and experience. Such steps were taken as resulted in obtaining security by way of collaterals or mortgages, amply protecting the bank against loss on these loans. By sale of collaterals, and payments by the debtors, these debts were finally reduced to about twenty-eight thousand dollars. After several extensions, suit at law was brought upon the unpaid balance. This suit was enjoined by the debtors by bill in chancery, seeking an account of usury, and claiming that the entire sum remaining due consisted of usury, which had, from time to time, been compounded. This suit was pending when complainants' bill was filed; but before the hearing the trustee, Hancock, compromised the matter by accepting eight thousand dollars in full of the notes

for twenty-eight thousand dollars remaining unpaid. For the loss thus sustained complainants seek a decree against the defendants in office when these loans were made.

In the view we take of this matter, it is unnecessary for us to consider whether the ignorance of the defendant directors of the fact of these loans is, under the peculiar circumstances of this case, such negligence as to make them chargeable with the consequences to the corporation. Assuming their responsibility if loss occurred, did the bank sustain any loss as the direct consequence of the negligence of the defendants in not preventing such use of the bank's funds by its own cashier? We think no such loss is shown. The balance due on the notes of Hampton and Carless was amply secure at the time the trustee compromised their liability. This compromise was not made by reason of any insolvency of the debtors or any infirmity in the securities held by the bank. The only defense was usury. The trustee regarded the whole debt as in peril by reason of this defense. The debtors claimed that the entire balance of twenty-seven thousand or twenty-eight thousand dollars was for usury. If this was true, it was a complete answer to the demands of the bank. The compromise was urged by a majority of the share-holders. The trustee submitted to the chancery court his power in the premises, which being held ample, he, as for the best interest of creditors and all concerned, agreed to the proposed settlement. Defendants cannot be held liable because usury upon a well-secured debt has not been collected. The settlement is a bar to a suit against them by the corporation, and therefore a bar to complainant's bill so far as this item is concerned. But upon another and distinct ground complainant cannot recover, and that is, the bar of the statute of limitations. None of these loans were made after 1879. The negligence of defendants, if any there was, occurred prior to January 1, 1880. This suit was begun in December, 1886, more than six years after the last act of negligence in this matter. The chancellor seems to have entertained the opinion that because a stockholder can alone sue in equity upon such a cause of action, that therefore this was one of that class of purely equitable actions against which the statute does not operate. But as we have before seen, this kind of suit is, at last, but the suit of the corporation for its benefit and upon its right of action. If for any reason the corporation is estopped from suing, or its action is barred, the suit by the stockholder or creditor is like-

wise affected. "A suit of this character," says Mr. Morawetz, "is brought to enforce the corporate or collective rights, and not the individual rights of the share-holders. It may therefore properly be regarded as a suit brought on behalf of the corporation, and the share-holder can enforce only such claims as the corporation itself could enforce. Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a share-holder. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, as to limitations, etc., because a share-holder has brought suit in equity to enforce it on behalf of the company": Morawetz on Private Corporations, sec. 271.

Directors are not express trustees. The language of Special Judge Ingersol in *Shea v. Mabry*, 1 Lea, 319, that "directors are trustees," etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandataries; they are agents; they are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith; they do not hold the legal title, and more often than otherwise are not the officer of the corporation having possession of the corporate property; they are equally interested with those they represent; they more nearly represent the managing partners in a business firm than a technical trustee. At most, they are implied trustees in whose favor the statutes of limitations do run: *Hughes v. Brown*, 88 Tenn. 578; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; Morawetz on Private Corporations, sec. 516.

An action at law lies in favor of the corporation against directors for malfeasance, misfeasance, or negligence in office, whereby loss or damage has resulted; and the limitation applicable to the suit of the corporation at law is equally applicable to the suit of the stockholder upon the corporate right of action in equity: Morawetz on Private Corporations, sec. 271; Cook on Corporations, sec. 701; *Godbold v. Branch Bank of Mobile*, 11 Ala. 191; *Williams v. Hilliard*, 38 N. J. Eq. 383; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Brinckerhoff v. Boetwick*, 99 N. Y. 193.

Our statutes of limitation operate upon all causes of action, save suits between cestui que trust and express trustee under

pure technical trusts cognizable only in courts of equity: *Hughes v. Brown*, 88 Tenn. 578.

The statutes of six and three years were relied upon by defendants, both by demurrer and plea, as applicable to complainant's entire cause of action. By section 2773 it is provided that "actions for injuries to personal or real property, actions for the detention or conversion of personal property," shall be barred unless suit is brought within three years from the accruing of the cause of action. This is not a suit for either injury to or conversion of personal property, and this section is not applicable. The last clause of section 2775 provides a limitation of six years for all actions "on contracts not otherwise provided for." The case of *Bruce v. Baxter*, 7 Lea, 477, was a bill in chancery against an attorney for neglect of duty in the collection of claims in his hands, whereby they were lost. The clause we have quoted from section 2775 was held applicable to the suit. The reasoning of Judge Freeman, who delivered the opinion of the court, was, that the relation of client and attorney implied a contract for the exercise of reasonable skill and diligence in doing what was undertaken, and that a failure to exercise such diligence was a breach of contract rendering the attorney liable for the loss resulting, but no more. A similar ruling was made in the earlier case of *Ramsay v. Temple*, 3 Lea, 253, it being a suit against an attorney for negligence in failing to sue out an execution. Those cases are controlling in this. The relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties he undertakes by accepting the office. For a breach of this duty an action lies, which is barred unless begun within six years from the time right of action accrued. There has been no fraudulent concealment of the cause of action by defendants, and the remedy of the corporation for any negligence in the matter of the loans to Hampton, or Hampton and Carloss, is barred.

Upon the pleadings and proof the chancellor dismissed complainants' bill, so far as it was sought to fix liability by reason of the matters heretofore considered. As to losses claimed to have resulted from overchecks, save certain items which he held unsupported by evidence sufficient to justify a reference, and losses resulting from improvident discounts, and claims lost by neglect to collect before insolvency or barred by limitation, he ordered a reference to the master, laying down very distinctly the grounds upon which the defendants were to be

charged. Upon this report and exceptions thereto, decrees were finally pronounced against defendants, aggregating about four thousand dollars. Errors have been assigned by both parties upon the decree of reference as well as upon the final decree. The first error assigned by complainant is, that the chancellor put upon complainant the burden not only of showing losses sustained by the corporation, but that such losses were attributable to the negligence of defendants.

Directors, by assuming office, agree to give as much of their time and attention to the duties assumed as the proper care of the interests intrusted to them may require. If they are inattentive to these duties, if they neglect to attend meetings of the board, if they turn over the management of the business of the company to the exclusive control of other agents, thus abdicating their control, then they are guilty of gross negligence with respect to their ministerial duties; and if loss results to the corporation by breaches of trust or acts of negligence committed by those left in control, which by due care and attention on their part could have been avoided, they will be responsible to the corporation. The diligence required from them has been defined as that exercised by prudent men about their own affairs, being that degree of diligence characterized as ordinary. If a less degree of diligence is exercised, the negligence is gross, and for losses consequent he is liable. "What constitutes a proper performance of the duties of a director," says Mr. Morawetz, "is a question of fact which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration": Morawetz on Private Corporations, sec. 552.

Bank directors are not expected to give their whole time and attention to the business of the company. The customary method in regard to such associations is, that the active management and responsible custody is left to the cashier and other agents selected by the directors for that purpose. These are paid salaries, demanding their skill and time should be given to the duties of immediate management. As a rule, the custodian of the assets is the cashier. The duty of directors with respect to such is to supervise, direct, and control. These agents, though usually selected by the directors, are not the agents of the directors, but agents of the corporation: Morawetz on Private Corporations, secs. 552 et seq.

The neglect which would render them responsible for not exercising that control and direction properly must depend upon the circumstances of each particular case. They are not insurers of their fidelity, and they are not liable for their acts on any principle of the law of agency.

"Directors," says Mr. Morawetz, "can be held responsible for a loss resulting from wrongful acts or omissions of other directors or agents only provided the loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with attention, or in neglecting to use proper care in the appointment of such agents": Morawetz on Corporations, sec. 562.

The collection of matured paper and the paying of checks primarily pertain to the duties of the agents of the corporation having the immediate management of its business. If defendants were liable in regard to such matters, it was for negligence in the selection or retention of such agents, or for neglect in the control and direction of these agents concerning their duties in such matters. It therefore devolved upon complainant to show that defendants had been neglectful in their duty in controlling or supervising these agents, and that this want of due care and attention had resulted in losses to the corporation. The ruling of the chancellor that the burden was upon complainant not only to prove losses, but to show that such losses were the consequence of the negligence of the directors, was right. One who seeks to recover for negligence must allege and prove it. So he must show that the damage he seeks to recover was the consequence of this negligence: *Bruce v. Baxter*, 7 Lea, 477.

Complainant's first assignment of error must be overruled. The only remaining assignment of error by complainant is the third, which is, that it was error in the chancellor to refuse a reference as to certain losses resulting from overchecks by O. P. Bruce & Co., F. J. Gray & Co., and Caldwell and Kelso. As to the overchecks of Bruce & Co. and F. J. Gray & Co., it is enough to say that they were all made more than six years before this bill was filed, and any liability is barred. The only evidence cited to support the assignment as to the overchecks of Caldwell and Kelso is that of the trustee, Hancock. The witness does not show that this firm was irresponsible when their account was overdrawn. It is not negligence *per se*, in the absence of a by-law or order of a superior officer, for a cashier to pay the overcheck of a responsible customer

Such overchecking is not uncommon, and in practical banking is almost unavoidable. In effect, the payment of an overcheck is a loan without security, upon the implied condition that the account shall be made the next day or upon notice. If not responsible negligence in the cashier to pay the overdrafts of responsible customers, it is clearly not a matter for which the directors can be made liable by mere proof that an account was overdrawn and a loss sustained. The assignment is overruled.

We come now to consider the errors assigned by defendants. The first is, that it was error to charge defendants with the notes of W. N. Moore and W. T. Ross as discounts improvidently made. The Moore note was taken in 1882 by the president of the bank, in renewal of a balance due upon an old note. The original note, as shown by the fact that the new note was chiefly for past due interest, was discounted more than six years before bill filed. The negligence, if any, was in discounting the original note, and any cause of action for that matter was barred. The W. T. Ross note was only for twenty-one dollars, and the cashier, Thomas, proves that a claim on Boyer and Blake, who were then regarded as responsible, was taken as collateral security. There was no negligence in this, and the first assignment is sustained.

The sixth assignment is, that it was error to charge defendants with certain small notes barred by limitations. The master had reported that there was no proof to show any losses sustained by neglect to sue. Upon exception by complainant, the defendants were charged with these notes. The only evidence cited by complainant to support this charge is that of Mr. Hancock, who, in answer to the question as to what assets turned over to him were barred, answered and set out these notes. It is not shown that they were solvent when discounted, or at any other time. It does not follow that they were lost to the bank because barred when they came to the hands of the trustee. Complainant should have gone further, and shown that they were solvent assets. The assignment is sustained.

The fourth assignment complains that it was error to charge defendants with the overchecked accounts of McCown Brothers and J. E. Caldwell & Co. The master had reported in favor of defendants upon these items, but upon complainant's exception they were charged to defendants. The evidence

does not show that these firms were irresponsible when their accounts were overdrawn.

The ruling made on complainant's third assignment with reference to the overchecked account of Caldwell and Kelso applies to this, and the fourth assignment of error by defendants is sustained. The remaining assignments relate to the overchecked accounts of the following firms and individuals, all of which were charged to the defendants: W. T. Ross and W. T. Ross & Co., \$1,359.86; R. P. Hairstone, \$328.59; Ship-Miles, \$72.69.

The decided weight of proof with reference to the last two accounts is, that while the drawees had little property, yet they were in business and had credit, and were accustomed to pay their debts. As to W. T. Ross, he was not indebted, was a man of character, was a profitable customer to the bank, and had a very large insurance business. The cashier was in the habit of indulging these parties by permitting them to overdraw, they paying interest. While it is probably true that none of these parties had property subject to execution, yet they were people of character and of business integrity, demanding and receiving credit. They had often overdrawn and made their accounts good. If it were shown that these overchecks were with the consent of defendants, it would not necessarily follow that they were liable upon mere proof that the drawees could not be coerced into payment. We are not to try the responsibility of bank officers or bank directors by the vigorous principles regarding loans by technical trustees or guardians or executors. To lend at all is a breach of trust by some trustees who have no authority to lend. But in this case we are dealing with an institution whose business it is to lend. The law has never undertaken to rigidly define the conditions upon which banks may lend. Among business men there is found a degree of trust and reliance upon moral character, business integrity, and thrift, justifying to a business man the soundness and prudence of a transaction which to judges and lawyers engaged in applying the hard and fast rules of law would seem indefensible and reckless. The standard of diligence and prudence by which bank officers and bank directors should be tried is that which business men have erected for themselves. Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers.

Several of the overchecked accounts heretofore disposed of upon other grounds were the accounts of men engaged in buying and shipping produce. One of those now under consideration was that of a man engaged in buying and shipping stock. These accounts were overdrawn upon an agreement that drafts drawn against the shipment, with bill of lading attached, should be turned over to the bank, and the account thus made good. Advances were made in this way, and the men thus enabled to carry on their business. In some instances losses finally resulted because of losses sustained by decline of values. In others the fund was misapplied. Without, however, determining the liability of defendants if it had been shown that these accounts were overchecked by permission of defendants, we decide only the case presented. The defendants did not authorize these overdrafts; nor did they have actual knowledge that the accounts were being overdrawn; nor is there any presumption of knowledge from the mere fact that entries upon the books of the bank would have shown that the cashier was permitting overdrafts.

A director, in a suit between himself and the corporation, or those suing upon the corporate right of action, is not presumed to have knowledge of all that is shown by the books of the company. The presumption of knowledge attaching to a director which is referred to in the case of *Lane v. Bank etc.*, 9 Heisk. 487, applies only in suits between the bank and a stranger. The doctrine has never been extended to suits between the bank and its directors: *Savings Bank of Louisville v. Caperton*, 87 Ky. 323; 12 Am. St. Rep. 488; *Clegg v. Bardon*, 86 Fed. Rep. 617; *In re Dunham*, 25 Ch. Div. 725.

The doctrine of the Lane case is carefully limited in *Martin v. Webb*, 110 U. S. 8.

Whatever may be said as to the negligence of the directors in office prior to 1880, it is overwhelmingly shown that after that time, and through the entire period covered by the overchecking now under consideration, that there was no inattention to the duties of their office. Meetings were regularly and frequently held, the assets, in shape of discounted paper were carefully examined, and directions given as to collections. The cashier was forbidden to allow any overchecking, and he was required to have the approval of at least one director to the discounting of any paper. Vigilant efforts were made to save the bank by closely looking after its assets. It is true that the money in the hands of the cashier was never counted, but as no

defalcation or larceny was ever committed, the fact becomes immaterial. After this renewed vigilance and attention there was no such habit or custom of permitting doubtful over-checks as to operate as notice; and under all the circumstances, we do not think defendants chargeable with the items embraced in the assignment of error now being considered.

Reverse the decree of the chancellor, and dismiss the bill, at cost of complainant.

CORPORATIONS — DIRECTORS. — As to what is the degree of skill and care which directors of corporations owe to the corporations, and when they must respond for damages suffered from their failure to exercise such skill and care, see *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 478; 17 Am. St. Rep. 84, and more particularly extended note 95-101; *Metropolitan B. Ry. Co. v. Kneeland*, 120 N. Y. 134; 17 Am. St. Rep. 619; note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 537-544.

CORPORATIONS — MISMANAGEMENT OF DIRECTORS — SUIT BY STOCKHOLDERS. — As to when, under what circumstances, and the method of procedure by which a stockholder may bring suit for himself and in behalf of the other stockholders against the directors of the corporation for mismanagement of its affairs, see extended note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 644-651; *Eckweiler v. Stowell*, 78 Wis. 316; 23 Am. St. Rep. 471, and note; *Bates v. Spinkman*, 73 Tex. 619; 15 Am. St. Rep. 556; *Rockwell v. Robinson*, 50 Minn. 1; 12 Am. St. Rep. 606, and note; *Alexander v. Seung*, 81 Ga. 638; 12 Am. St. Rep. 387. A stockholder, or a minority of stockholders, cannot maintain an action to prevent illegal action of the majority without a previous request to the directors to interfere and their refusal to do so, unless it is shown that any such request would be of no avail: *Mack v. De Bardleben etc. Co.*, 99 Ala. 396; *Memphis etc. R. R. Co. v. Woods*, 58 Ala. 430; *City of Chicago v. Cameron*, 120 Ill. 447; *Ashton v. Duchesny Acfn*, 84 Cal. 46; *Woodroff v. House*, 88 Cal. 184; *Moyle v. Landers*, 83 Cal. 579; *Hodgeson v. Duluth etc. R. R. Co.*, 46 Minn. 454; *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 630; *Burr v. New Fort etc. R. R. Co.*, 125 N. Y. 203. But, ordinarily, the rule is, that individual stockholders cannot in their own names assert the rights of the corporation: *Moore v. Silver Valley M. Co.*, 304 M. C. 534; *Mealey v. Nickerson*, 44 Minn. 430.

CORPORATIONS — SUIT BY ASSIGNEE AGAINST DIRECTORS FOR MISMANAGEMENT. — As to when the assignee of an insolvent corporation may bring suit against the directors for mismanagement of the corporate business, see note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 544, 545.

BANKS AND BANKERS — LIABILITY OF DIRECTORS FOR LOSS OF CASH. — The directors of a bank are not responsible for the faults and negligence of the cashier, when they themselves are free from fault; and the burden of proof is upon the plaintiff to show a want of diligence on the part of the directors in discovering or preventing the losses through the acts of the cashier: *Savings Bank etc. v. Caperton*, 87 Ky. 306; 12 Am. St. Rep. 486, and note.

CORPORATIONS — TRUSTS — STATUTE OF LIMITATIONS. — The directors of a corporation must be regarded as trustees of the corporate affairs and property for the benefit of the stockholders, who are the beneficiaries: *Pearson v.*

Concord R. R. Corp., 62 N. H. 537; 13 Am. St. Rep. 590, and note; note to *Beach v. Miller*, 17 Am. St. Rep. 298-306. And when the trustee is barred by the statute of limitations, the *cestui que trust* is also barred: Note to *Miles v. Thorne*, 99 Am. Dec. 308, 309; *Hughes v. Brown*, 88 Tenn. 578; *Chase v. Cartright*, 53 Ark. 358; 22 Am. St. Rep. 287; except in the case of express trusts: *Fox v. Toy*, 89 Cal. 339; 23 Am. St. Rep. 474, and note.

CORPORATIONS — DIRECTOR — KNOWLEDGE OF TRANSACTIONS. — A director of a corporation is not chargeable with actual knowledge of its business transactions merely because he is such director: *Rudd v. Robinson*, 126 N. Y. 118; 22 Am. St. Rep. 825; and note.

CASES
IN THE
SUPREME COURT
OF
VIRGINIA.

CONRAD v. EFFINGER.

[87 VIRGINIA, 59.]

VENDOR AND VENDEE — EVICTION — MEASURE OF DAMAGES. — A purchaser of land under warranty deed is entitled, upon eviction, to the purchase price paid, as against the vendor, with interest from the date of eviction.

VENDOR AND VENDEE — EVICTION AS TO PART — MEASURE OF DAMAGES. — Where a purchaser buys land with notice of infirmity of title, and, after improving it, sells it at an increased price, and the purchaser from him is evicted as to one fourth thereof, the first purchaser can recover of his vendor only one fourth of the price paid by him, while he must pay to his purchaser one fourth of the price received from him.

VENDOR AND VENDEE — EVICTION — MEASURE OF DAMAGES — COUNSEL FEES. — Where a vendee is evicted for failure of title which the vendor employs counsel to defend, the vendee cannot recover from the vendor his counsel fees in addition to the price paid for the land, with interest thereon from eviction.

E. S. Conrad, for the appellant.

W. B. Compton, G. G. Grattan, and Sipe and Harris, for the appellees.

LACY, J. This is an appeal from a decree of the circuit court of Rockingham County, rendered on the nineteenth day of April, 1889, and is a controversy between the parties in the suit of *Effinger v. Hall*, in the said court, which was considered in this court in 1885, and decided at the November term thereof of that year, and is reported in 81 Va. 94. By reference to that case, it will be seen that one James Hall, of Harrisonburg, Virginia, by will probated in March, 1835, devised certain real estate to his wife for life, and at her death to be sold, and the

proceeds divided as stated. The widow married, and she and her husband conveyed the life estate to purchasers named in the record, and subsequently some of the parties entitled to the proceeds of the sale of the said lands, upon the execution of the will, after the termination of the life estate, conveyed their interests, and the purchasers thus acquired eleven sixteenths of the said proceeds. In 1850, the purchaser conveyed some fifteen acres, situated in the town of Harrisonburg, to the appellee's testator, M. H. Effinger, which were divided into town lots and built upon by subsequent purchasers, among them the appellant's intestate. The life estate terminated in 1879 by the death of the wife of James Hall, who had become Mrs. Dondale. Whereupon certain claimants under the will of James Hall, who had not parted with their interests in the proceeds of the sales of these lands devised by the will to be sold, filed their bill against Effinger and the various persons in possession of said land under deeds from Liggett, the purchaser of the other interests, asking that the will be construed, that the land be sold, and that the proceeds be distributed. In that suit the circuit court decided that the complainants were entitled to five sixteenths of the lands, without compensating the defendants for the improvements the latter had put upon them, and directed the lands to be sold. Upon appeal here by the defendants in that suit, the decree of the circuit court was affirmed. The controversy on this appeal is as follows: The property about which this dispute is, which is a part of the above-mentioned lands of James Hall, deceased, was conveyed August 19, 1862, by Smith, commissioner, to William A. Conrad, in consideration of the sum of three thousand three hundred dollars. On September 26, 1862, Conrad conveyed to John T. Harris, with general warranty. Under the decree of this court of November, 1885, above referred to, the property was sold to Harris at four thousand five hundred dollars on the twenty-fourth day of June, 1886. This sale was confirmed by the court, and the cause was referred to a commissioner, with instructions to ascertain the rights and liabilities among themselves of the defendants. The commissioner reported the right of recovery of those claiming under the warranty of Effinger, deceased, to be five sixteenths of the purchase price paid said Effinger, with interest from the date of eviction, and the costs incurred in defending the title. Concerning this rule as to the measure of damages, there appears to be no dispute. The

statement of Judge Richardson in *Click v. Green*, 77 Va. 835, from *Threlkeld v. Fitzhugh*, 2 Leigh, 451, "that the purchaser, upon eviction in a case like this, is only entitled to the purchase price paid, with interest from the date of eviction and costs," is conceded on both sides. But the circuit court having confirmed the commissioner's report, the appellant appeals to this court, and assigns as error the decision of the court that there was, in the said suit of *Effinger v. Hall*, 81 Va. 94, an eviction as to five sixteenths only of the property sold, claiming that there was a total eviction as to Harris, and that he (Conrad) was therefore entitled to recover of Effinger the whole amount of his purchase-money. There was a technical eviction of the whole property, but the value of eleven sixteenths was not lost, but retained, and the actual loss was only five sixteenths of the property, and to this the recovery is limited under the terms of the rule above stated. The commissioner fixed (and the court approved) the liability of Effinger to Conrad at five sixteenths of the purchase price paid by him to Effinger at date of eviction, and the liability of Conrad to Harris, his vendee, was fixed upon the same principle, but as the lot was expensively improved when Harris purchased, having been built upon by Conrad, the price paid was \$4,500, by Harris to Conrad, whereas Conrad bought the unimproved property at \$1,874; the commissioner taking as his basis the purchase price stated in the deed in each case.

The appellant claims that he should be allowed a fee of fifty dollars as an attorney's fee for defending the title Effinger sold, which should be paid by Effinger; but this claim the court disallowed, upon the ground that, when called upon by Conrad to defend the title, he promptly employed and paid a competent attorney to do this, and should not therefore be required to pay any other attorney. The effect of the court's decision in this case is to apply the rule of compensation, as stated from *Click v. Green*, 77 Va. 835, to each of the purchasers, Conrad and Harris, Conrad being compensated upon the basis of five sixteenths of \$1,874, and Harris upon the basis of \$4,500. Conrad claims that he should recover of Effinger all that Harris recovered of him, but under the decision in *Effinger v. Hall*, 81 Va. 94, he was held to have purchased with notice of the infirmity of his title, and so he cannot have his recovery based upon improvements made by him, and is held to the basis of his purchase-money, etc. The same rule

has been applied to Harris, but it affects him differently, because he did not erect the valuable improvements, but purchased them. Therefore, the amount of his purchase-money exceeding that of Conrad, his recovery exceeds Conrad's. And the decree of the circuit court upon that question is correct, and not erroneous. As to the fee claimed, it was rightly rejected, as Effinger had employed and paid competent counsel. Upon the whole case, we are of opinion to affirm the decree of the circuit court appealed from.

Decree affirmed.

VENDOR AND PURCHASER — EVICTION — MEASURE OF DAMAGES. — Where there is a sale of land with covenant of warranty, and the vendee is evicted, he may recover the value of the land, if he has paid the purchase price. If the purchase-money has been partly paid, he may recover that much, with interest: *Beecher v. Bolchelt*, 55 Conn. 479; 3 Am. St. Rep. 57, and note; *McGuffey v. Hunter*, 85 Tenn. 20.

VENDOR AND PURCHASER — KNOWLEDGE OF DEFECTIVE TITLE. — A purchaser of land who knows the title to be defective cannot recover from the rightful owner the value of improvements placed thereon, in an action of ejectment brought by the latter: *Waller v. Quigg*, 6 Watts, 57; 31 Am. Dec. 452; *Bayer v. Amsat*, 41 La. Ann. 721.

For the measure of damages for the breach of warranty of title to real property, see note to *Greene v. Black*, ante, pp. 264-265.

JONES v. TEMPLE.

[27 VIRGINIA, 210.]

VENDOR AND VENDOR — PAROL CONTRACT TO PURCHASE — TENANCY AT WILL. — **RESCISSORY.** — A party in possession under a parol contract to purchase land is a tenant at will, and cannot be ejected by his grantor or by the latter's grantee, without demand for possession, or notice and refusal to surrender, or some other wrongful act by him to determine such possession.

F. E. and E. P. Buford, for the appellant.

R. Turnbull, for the appellee.

LACY, J. In March, 1889, the defendant in error filed his declaration in ejectment against the plaintiff in error, for the recovery of the possession of a certain tract of land in Brunswick County. At the term of the court following, the defendant pleaded not guilty; at the trial of the case, after the plaintiff had introduced a deed to the said tract of land, executed to him by one Robert H. Jones on the tenth day of October, 1888, duly recorded, the defendant offered to prove

“that about eighteen years ago he entered into a certain parol ageement with the said Robert H. Jones, wherein the said Robert H. Jones contracted to sell the said tract of land to the defendant for the sum of fifty-five dollars, and thereupon put the defendant into possession of the said land, and that the defendant has continued to hold possession, undisturbed, of this land until the institution of this suit, and has never received any notice to surrender the possession of the said land previous to the institution of this suit.”

All of this evidence the court excluded from the jury, upon the ground that the same was inadmissible unless the defendant introduced a contract in writing between him and the said Robert H. Jones; when the defendant excepted, and judgment going for the plaintiff, the said defendant applied for and obtained a writ of error to this court.

The said ruling of the said circuit court of Brunswick was plainly erroneous. The defendant having come into possession lawfully, with the consent of the owner of the land, under a parol contract for the purchase of the land in question, he had a right to be there until his possession should become unlawful. And, as to this question, it was immaterial whether the contract was in writing or by parol. As this question does not arise under sections 2741, 2742, and 2743 of the Code of Virginia, which provides for the equitable defense at law which entitle the defendant to a deed in court of equity, provided the defendant has given the notice required by section 2743 of the code.

This question does not arise under the statute cited above, and the same does not affect it. But in England, at the common law, a person entering under a contract for the purchase of an estate (with which he has not complied) with the consent of the vendor was deemed a tenant at will. Tenant at will is when lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called a tenant at will, because he hath no certain nor sure estate; for the lessor may put him out at what time it pleaseth him. And estates at will may arise by implication as well as by express words. Thus if a tenant for years holds over his term, and continues to pay rent as before, such payment and acceptance of rent will amount to a lease at will. And, upon similar principles, a person entering under a contract of purchase which he has not complied with

would be a tenant at will, for the possession of the tenant is by virtue of an entry by the consent of the vendor; it is not adverse, but, as the only other alternative, it is a tenancy at the will of the vendor. A person occupying land when no terms are prescribed, and without any reservation of payment of rent, is a tenant at will.

Lord Coke says every lease at will must, in law, be at the will of both parties; therefore, when a lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also. So it is when the lease is made to have and to hold at the will of the lessee; this must be also at the will of the lessor. And where an estate at will is determined by the lessor, the tenant is entitled to the corn sown and other emblements.

With respect to the acts which amount to a determination of an estate at will on either side, the first and most obvious mode of determining it by the lessor is an express declaration that the lessee shall hold no longer, which must either be made on the land or else notice of it given to the lessee. The tenant at will, being entitled to notice of the determination of the lessor to end the lease, is entitled to a reasonable notice of the determination of the lessor's will before he is obliged to quit. What is reasonable notice of such determination is a question of law, to be determined by the particular circumstances of each case. The time must be sufficient to enable the lessee to take the emblements, and to remove his family, his furniture, and other property.

In the case of *Right v. Beard*, decided in the court of king's bench in 1810, 13 East, 219, it was held that "one who is put into possession upon an agreement to purchase the land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise: *Birch v. Wright*, 1 Term Rep. 383, opinion of Buller, J.

To the same effect is *Goodtitle v. Herbert*, 4 Term Rep. 680, opinion of Lord Kenyon, C. J., where it was held, upon a parol agreement to lease land for four years, that such only creates a tenancy at will; and if that tenancy be not determined before the day of the demise laid in the declaration, that the plaintiff could not recover in ejectment: *Deane v. Rawlins*, 10 East, 201; *Doe v. Jackson*, 1 Barn. & C. 448; 1 Coke Inst. 57; Coke Lit., sec. 68; Lomax's Digest, I, 192.

This rule of the English common law is the law of this

state. See the case of *Williamson v. Paxton*, 18 Gratt. 475, 505, where it is stated, but in a case where it did not arise.

In *Twyman v. Hawley*, 24 Gratt. 512, 18 Am. Rep. 661, however, the question came squarely up for decision, when Staples, J., is reported as saying: "This record presents but a single question for adjudication, and that is, whether a person placed in possession of land under an agreement for a purchase, but who is in default in the payment of the purchase-money, is liable to be turned out of possession by ejectment, without previous demand or notice by the vendor."

In which case it was said that this doctrine we have set forth above had long been established, and that then it had been uniformly held that the vendor, having placed the vendee in possession, he cannot, without a demand of the possession and a refusal by the vendee, or some wrongful act by him to determine such possession, treat the vendee as a wrong-doer and a trespasser, as he must assume him to be in instituting an action of ejectment; citing *Right v. Beard*, 13 East, 219, and other cases; asserting that the doctrine had received the sanction of this court, and was sound and just, and should be adhered to by our courts.

This rule is maintained in other states of this country: *Carson v. Baker*, 3 Dev. 220; 25 Am. Dec. 706. In some of the states it is otherwise. See Am. & Eng. Ency. of Law, I, 240, where the whole subject is elaborately reviewed, and the decisions of the states collated upon this subject.

The circuit court of Brunswick having decided in this case contrary to this well-established rule, and to the decisions of this court upon this subject, the same is erroneous, and must be reversed and annulled, and the case remanded to the said court for a new trial to be had therein in accordance with this opinion.

VENDOR AND PURCHASER — PAROL AGREEMENT TO CONVEY — TENANT CREATED. — One who is let into possession under a parol contract to purchase is a tenant at will: *Harrie v. Fink*, 49 N. Y. 24; 10 Am. Rep. 312; *Patterson v. Stoddard*, 47 Me. 355; 74 Am. Dec. 490, and note; *Knight v. Hartman*, 81 Mich. 462; *Hall v. Wallace*, 88 Cal. 434. See also extended note to *Stedman v. McIntosh*, 48 Am. Dec. 126.

HALL v. PALMER.

[57 VIRGINIA, 354.]

WILLS — CONSTRUCTION — ESTATE IN FEE. — Where a testator by will bequeaths his estate to his five daughters absolutely, and then provides that the share bequeathed to one of them shall be held by his executor for her sole use and benefit during her life, and at her death the balance, if any, to go to her children, she will take an estate in fee-simple, the limitation over being void for repugnancy.

Guy and Gilliam, and W. R. Barksdale, for the appellant.

John W. Riely and Henry Edmunds, for the appellees.

LACY, J. In a suit for the partition of a tract of land in the said county of Halifax, the true construction of the will of the late Philip Johnson, who died in 1849, was drawn in question. The sections or clauses of the said will drawn in question by this appeal are the third and eighth clauses of the said will.

The third clause is as follows: "I give and bequeath to my five daughters as follows, viz., Nancy H. Terry, Judith Palmer, Mary C. Tayler, J. Hall, and Frances Maria Armes, two thirds of my estate now in possession, to be equally divided between them."

The eighth clause is as follows: "I will and direct that the whole of Susan J. Hall's and Frances Maria Armes's interest in my estate shall be held by my executor, his heirs, executors, and administrators or assigns, for the sole use and benefit of them during their natural life, and at their death the balance, if any, to their children."

Susan J. Hall died, leaving her husband her surviving. The son lived to be twenty years old, and died, his father surviving him. The father married a second wife, and died, leaving her surviving, and by his will devised the land in question to his said second wife, the appellant here.

This controversy has arisen between the widow of Elijah C. Hall, the said appellant, and the heirs at law of Susan J. Hall, his first wife, and the devisee under the will of Philip Johnson, and the question to be decided between them is, What estate did the said Susan J. Hall take under the will of her said father, set forth above?

The learned judge of the circuit court held that "Susan J. Hall took an absolute and fee-simple estate in the property given to her under the will of Philip Johnson, and that the gift over, under the eighth clause of the said will, 'of the bal-

ance, if any,' is void, both for repugnancy and uncertainty, and that the land in the bill and these proceedings mentioned passed, at the death of her husband, Elijah C. Hall (who had an estate for life therein as tenant by the curtesy), to the heirs at law of the said Susan J. Hall." Whereupon the appellant, Prudence E. Hall, the widow and devisee of the said Elijah C. Hall, applied for and obtained an appeal to this court.

We think the decree of the circuit court, cited above, is plainly right. It sets forth what is the plain and explicit direction of the will, and no other construction of that instrument is reasonable upon the face of it, and it is in accordance with the manifest intention of the testator, to be gathered from the words employed to express his intention, and it is not necessary to call to our aid any decisions or precedents in such a case.

And as was said by Judge Richardson in *Cart v. Effinger*, 78 Va. 206: "We should remember as a great truth the remark made by Judge Pendleton in *Kennon v. McKoberts*, 1 Wash. 96, 1 Am. Dec. 428, and quoting from able judges who had gone before him, 'that cases on wills serve rather to obscure than illuminate questions of this sort; that cases on wills may guide as to the general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as as the polar star to direct them in the construction of wills.'" Yet the language of courts, when they speak of the prevailing intention as the governing principle, must be "understood with this important limitation, that here, as in other instances, the judges submit to be bound by precedents and authorities in point, and endeavor to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture": Jarman on Wills, 2, 838.

In the case of *Riddick v. Cahoon*, 4 Rand. 549, Judge Green, speaking of a case where the property was given to the daughter absolutely and in the strongest terms, with the provision that if the daughter should die without lawful heir or issue of her own body, then what was given to the daughter, that shall be left remaining at her death, to his sisters, said: "What did the testator mean by these words, 'that shall be left remaining at her death?' Did he mean that all the property given to his daughter which did not perish in her lifetime should immediately, upon her death, go over, if she had

no issue then living? Or did he mean all the property which she had previously disposed of should go over upon failure of her issue, whenever that event might happen?"

The first construction is that contended for by the appellant. The latter, I think, is the true construction. The testator had given to his daughter, and her heirs and assigns forever, an absolute estate, and intended not to restrain the unlimited power of alienation incident to that estate, but to control the future disposition of so much of the property as she might not dispose of in her lifetime, and that it should go to her issue, if she had any, as long as they existed; and upon the failure of issue, to his sisters, or their representatives.

If, however, the conclusion last stated is not correct, and the testator intended to give over the property left only in the event of his daughter's dying without issue living at the time of her death, it is clear that he intended to give to his daughter an absolute power of alienation; and in that case could not control the property not disposed of by her, as such control would be inconsistent with the nature of the estate given to her, and the limitation void for uncertainty as to what property was to go over; citing *Gray v. Montagu*, decided by Lord Chancellor Northington in 1764, and his decree affirmed in Parliament in 1770 (3 Brown Parl. Cas. 314), to the same effect, and saying: "There are other cases to show that, after an absolute property given to one, with an unlimited power to dispose of it, express or implied, a disposition by the donor of so much of the property as may not be disposed of by the donee or legatee, to another, is void, because of the inconsistency and the uncertainty as to what part of the property is to go over." See also the case of *Peckman v. Filliter*, 3 Ves. 7, with the provision "what shall be left," held by the master of rolls to be an absolute gift to the wife; *Bull v. Kingston*, 1 Mer. 314, with the provision "whatever shall remain at her death"; *Att'y-Gen. v. Hall*, 8 Vin. Abr. 103, pl. 50; opinion of Lord Hardwicke in *Flander v. Clark*, 1 Ves. 9; *Miller v. Moon*, Vin. Abr. 248, pl. 21, with the provision "or make no disposal of," which was held to give a fee-simple, — opinion of the master of the rolls; *Henderson v. Cross*, 29 Beav. 220, with the provisions "to spend both principal and interest, or any part of it, during his lifetime," and "should my dear father not spend the property which I leave in trust for him"; the case of *Elcan's Adm'r v. Lancastrian School*, 2 Pat. & H.,

58, with the provision "of whatever she may leave" at her death; *Bursell v. Anderson*, 3 Leigh, 348, with the provision "by will or otherwise, may have the absolute disposal of"; *Melson v. Cooper*, 4 Leigh, 408, with the provision "if he should die without a son, and not sell the land"; *Brown v. George*, 6 Gratt. 424, with the provision "so much of the property as might be in existence at the death of the first taker"; *Carr v. Effinger*, 78 Va. 206, with the provision "at the death of my wife, what bonds she may not have used I give"; *Cole v. Cole*, 79 Va. 251, with the provision "that may be on hand," "giving the wife the absolute disposal of the personalty"; *Missionary Soc. etc. v. Calvert's Adm'r*, 32 Gratt. 357, with the provision "but such part as she did not appropriate should pass at her death," etc., are to the same effect. See also 2 Minor's Inst. 969, 970.

In this case the gift was to the daughter of one fifth of two thirds of the estate in absolute property. It is then provided that this estate shall be held by the executor for her sole use and benefit during her natural life, and at her death the balance, if any, was to go to her children. It was the evident intention of the testator that the daughter was to use and enjoy and expend whatever she wished of this estate, and her right to do this is not limited to any degree; and the provision "the balance, if any," cannot be construed to limit her power of disposal, which is absolute and unlimited, as an incident to the estate granted, and the provision for her children is void for repugnancy and uncertainty, and cannot be held to limit the estate which was granted to the daughter.

As we have said, we think the decree complained of is plainly right, and the same must be affirmed.

DEVISE — ESTATE IN FEE — REPUGNANCY. — Where a will gives the devisee therein an estate for life, with power to sell the same and to possess and enjoy it during life as if he owned a fee-simple estate therein, with remainder to the testator's nephews, the devisee takes an estate in fee, the remainder being void for repugnancy: *Bowen v. Bowen*, 87 Va. 438, post, p. 654. Compare *Miller v. Potterfield*, 86 Va. 876; 19 Am. St. Rep. 919, and notes; *Oyster v. Knall*, 137 Pa. St. 448; 21 Am. St. Rep. 890. Where an estate or interest in lands is devised, or personalty bequeathed, in clear and absolute language, without words of limitation, the devise or bequest cannot be defeated or limited by a subsequent doubtful provision in the will inferentially raising a limitation upon the prior devise or bequest: *Bills v. Bills*, 99 Iowa, 269; 20 Am. St. Rep. 418, and note. A devise to one for life, with remainder in fee to his heirs at law, vests in him an estate in fee: *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and extended note; *Leffers v. Gray*, 101 N. C. 162; 9 Am. St. Rep. 30; *Tresler v. Heller*, 107 N. C. 617;

Gilmer v. Datz, 141 Pa. St. 505; *Green's Estate*, 140 Pa. St. 253; *Covar v. Gantelon*, 25 S. C. 35; *McCauley v. Buckner*, 87 Ky. 191; *Anders v. Gerhard*, 140 Pa. St. 153; *Lofton v. Murchison*, 80 Ga. 391; *Wedekind v. Hallenberg*, 88 Ky. 115; *Waters v. Bishop*, 122 Ind. 516. If the terms of a will permit a devisee to act with respect to the devised property in such a way as does one who owns a fee-simple, a limitation over is void for repugnancy: *Ross v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493, and foot-note; *Stowell v. Hastings*, 52 Vt. 494; 59 Am. Rep. 748.

BRUCE v. ROPER LUMBER COMPANY.

[87 VIRGINIA, 381.]

EVIDENCE TO VARY CONTRACT ADMISSIBLE AS TO THIRD PARTY. — Although the parties, as between themselves, cannot introduce parol evidence to contradict their contract, a third person, who is a stranger to the contract, but affected by its terms, may show by parol what was the true meaning and scope of the contract, and that it amounted to a mere revocable license only.

S. D. Davies and E. E. Holland, for the appellant.

White and Garnett, for the appellee.

HINTON, J. This is a controversy between the appellant and appellee as to the right of the former to cut timber in that part of the Dismal Swamp which, from its proximity to Suffolk, is known as the "Suffolk side" of the swamp.

The appeal is taken from a decree of the circuit court of Nansemond County, which perpetuates the injunction previously awarded, and allows the defendant, Bruce, "to remove from the lands in the bill and proceedings mentioned all the timber which he had cut thereon prior to the fourteenth day of August, 1886, that being the date on which he received notice from the Dismal Swamp Land Company to cease cutting on said lands."

This decree, we think, after repeated and careful examinations of the record and the able argument presented for the appellant, should be sustained, because we are satisfied that, no matter what may be the rights, if any, of the said Bruce under his contract to cut "down and refuse lumber," that those rights were to be taken in subordination to the rights of the John L. Roper Lumber Company, and never were intended to extend to the cutting of the juniper and cypress lumber, except as a subcontractor of that company.

Without going into a detailed statement of all the testimony upon these points, we think it sufficient to say all this fully

appears, not only from the testimony of Royall, Henning, and Roper, but from the testimony and acts of Bruce as well; for after having waited some time, according to his own admission, to find out from Roper's own lips what were the rights of John L. Roper Lumber Company, and whether they had been surrendered so far as the Suffolk side of the swamp, thus impliedly admitting that whatever those rights were, that he knew that they were superior to his own, he nevertheless, without having seen Roper, went on and entered into the contract with Royall, president of the Dismal Swamp Land Company, and commenced to cut timber, both dead and growing, under it.

In answer to the thirty-third cross-question, which is in these words: "Then you knew, both in person and by letter from the president of the lumber company, that he declined to let you cut juniper and cypress timber, and you say that at your second interview Mr. Roper told you that he had a contract for all the juniper on the company's land, and that Mr. Royall had no right to contract with me, you, or any one else? Is that so?"—he says: "Yes, sir." Thus showing in the clearest manner, as we have said before, that although he was aware of the superior rights of the lumber company, he went on and acted in defiance of them.

The court is also of opinion that although neither Bruce nor the Dismal Swamp Land Company can be allowed, as between themselves, to introduce testimony to contradict the contract made between them, that it is competent for the lumber company, a stranger to said contract, to show what was the true meaning and scope of that contract: *Barreda v. Silbee*, 21 How. 169, and cases there cited.

The rule, says Mr. Greenleaf, excluding parol proof in such cases, is applied only (in suits) between the parties to the instrument. It cannot affect third parties, who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who ought not, therefore, to be precluded from proving the truth, however contradictory to the written statements of others: 1 Greenl. Ev., sec. 279.

And the court is further of opinion that that contract, when viewed in the light of the surrounding circumstances, amounts to a mere license, revocable at the will of the Dismal Swamp Land Company, and that the same was revoked on the four-

teenth day of August, 1886, by the notice sent them on that day.

Entertaining these views as to the facts, we only deem it necessary to add that we concur in the decree entered by the lower court, and that the same must be affirmed.

PAROL EVIDENCE — WRITTEN INSTRUMENTS. — The rule that an instrument of writing cannot be contradicted or varied by parol evidence applies only between the parties and privies: *Whitbeck v. Whitbeck*, 9 Cow. 266; 18 Am. Dec. 503, and note; and is not applicable in contentions between third parties, and any of the parties to the contract: *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; 14 Am. Rep. 239; *Coleman v. Pike County*, 83 Ala. 326; 3 Am. St. Rep. 746, and note.

DE FARGES v. RYLAND.

[57 VIRGINIA, 401.]

WITNESSES — WHEN HUSBAND AND WIFE ARE BOTH INTERESTED in the result of a suit, neither is competent as a witness.

HUSBAND AND WIFE — POST-NUPTIAL SETTLEMENT — CONSIDERATION TO SUPPORT. — A relinquishment by a wife of an interest in her husband's estate, whether contingent or certain, or of her own estate, or making a charge upon it for her husband's benefit, will constitute a valuable consideration to support a post-nuptial settlement, when there is no badge of fraud.

HUSBAND AND WIFE — VOLUNTARY POST-NUPTIAL SETTLEMENT is good against subsequent creditors, when there is no fraud, and the settlor is not indebted when he makes it.

HUSBAND AND WIFE — VOLUNTARY POST-NUPTIAL SETTLEMENT, WHEN VOID — EVIDENCE. — Every voluntary post-nuptial settlement made when the settlor is indebted is fraudulent and void as against his creditors; and every such settlement is deemed voluntary, unless those claiming under it can show that it was made for a valuable consideration. Such consideration cannot be shown by the answer in an action to annul the deed of settlement for fraud, nor by recitals in the deed.

HUSBAND AND WIFE — DEED OF SETTLEMENT AS EVIDENCE. — Recitals in a deed of post-nuptial settlement are conclusive upon parties claiming under the deed, but are not evidence as against creditors attacking it for fraud.

HUSBAND AND WIFE — POST-NUPTIAL SETTLEMENT — EVIDENCE INSUFFICIENT TO SUSTAIN. — A post-nuptial settlement on the wife of all his property, made by a husband largely indebted, upon a consideration and under an agreement recited in the deed of settlement, is void as to creditors, in the absence of clear and distinct proof, other than the recitals in the deed and the wife's evidence, of a valuable consideration.

BILL to annul a trust deed as in fraud of creditors. The deed in question was executed by one John S. De Farges. By it he conveyed all his property to one King, to be held in

trust for the benefit of grantor's wife, Josephine De Farges, free from the claim of all persons claiming under him. Decree annulling the deed, and De Farges appealed.

J. N. Stubbs, for the appellants.

H. R. Pollard, for the appellees.

LACY, J. The first assignment of error necessary to notice is the complaint that the sale was ordered before the report of the trustee came in, closing the first trust deed as to the sale of the saw-mill. Regularly, this report should have been in, in order to ascertain the balance due after crediting the proceeds of the saw-mill; but the report being filed, it appears that Mrs. De Farges was the purchaser at this sale, and therefore there was no injustice or injury to the appellants, as they appear to have had full knowledge and information upon this subject.

The next assignment is, that the court erred in excluding the deposition of Mrs. De Farges in this cause. This question is too well settled to admit of any profitable discussion. As was said by this court in the case of *Burton v. Mill*, 78 Va. 470, as to the competency of husband and wife in such case: "They occupy the relation of husband and wife, and are both interested in the result of this suit. They are therefore incompetent as witnesses": *William and Mary College v. Penell*, 12 Gratt. 372; *Murphy v. Carter*, 23 Gratt. 486.

But it is insisted that Mr. De Farges was not interested in this suit, because he had parted with all interest to his wife; but that is the very question, — whether this act is valid which was done by him, — and the cases all hold that he is interested in such a case. As he obviously is, his wife is also interested. Her interest would not render her incompetent, but his interest does render his wife incompetent as a witness.

It is assigned as error that the circuit court annulled the deed of March, 1887, as fraudulent and void as to existing creditors. It is settled that the relinquishment by the wife of a certain or even a contingent interest in her husband's estate will support a post-nuptial settlement, when there is no badge of fraud: 1 Eq. Cas. Abr. 19; 2 Ves. 16. So, likewise, the releasing her jointure or dower: Prec. Ch. 113; 2 Lev. 70, 147; 2 Vern. 220; *Blow v. Maynard*, 2 Leigh, 81.

If the parting with these contingent interests of the wife has this effect, it follows, *a fortiori*, that her parting with her

own estate, or making a charge on it for her husband's benefit, will constitute a valuable consideration: 2 Lev. 148; Cowp. 278; and *Lady Arundel v. Phipps*, 10 Ves. 129.

It has also been decided that, in settlements after marriage, a consideration moving from the wife will support limitations to her children, as well as in her own favor: *Ward v. Shallet*, 2 Ves. Sr. 16-18; *Lavender v. Blackstone*, 2 Lev. 147.

But though these settlements will be supported when they appear to have been made upon a fair contract for a valuable consideration, and in the execution of such a contract, yet, from the relative situation of the parties, and the convenient cover they afford a debtor to protect his property and impose upon the world, they are always watched with considerable jealousy.

A post-nuptial settlement will be good against subsequent creditors when there is no fraud, and the settlor is not indebted when he makes it.

But when the debtor is greatly indebted and harassed by his creditors, the very fact of his making a settlement excites strong suspicion, and to support it an adequate consideration must be shown, together with the absence of those other badges which generally attend a fraudulent transaction.

Every voluntary post-nuptial settlement, when the settlor is indebted, is, as against his creditors, fraudulent and void; and every settlement will be taken as voluntary, unless those claiming under it can show that it was made for a valuable consideration. Such consideration set up in the answer by way of defense must be established by legal evidence. .

As was said by Judge Carr in *Blew v. Maynard*, 2 Leigh, 81: "If the defendant, charged with fraud in accepting and holding under a voluntary deed, could by her own answer supply proof of a contract and the execution of it, and of a valuable consideration for the deed, then in truth it may be said that to require proof of a consideration at all is a mere farce."

The recitals in a deed are said to be conclusive against all persons claiming under the settlor, but such recitals are not proof against creditors attacking the deed.

If such recitals were proof against creditors, it would be putting into the hands of a fraudulent debtor a most dangerous weapon.

As was said by the master of the rolls in *Batterbee v. Barrington*, Swanst. 106: "Such a doctrine would give to every trader a power of excluding his creditors by a recital in a

deed to which they are not parties": *William and Mary College v. Powell*, 12 Gratt. 872.

It is shown that Mr. De Farges came into the possession of considerable property by his marriage. There is no proof of any contract made at the time of the marriage, and no claim made concerning such agreement until some seventeen years after the marriage, when the husband had become largely indebted in numerous debts, some of which had been secured by two previous deeds in trust, and many secured by judgments recovered against the settlor, and many more were sued on. The trust deed in question was made for alleged consideration of six thousand five hundred dollars, amounts advanced from time to time by Josephine De Farges, and in further consideration of the sum of fifteen hundred dollars, due for timber cut on her land, and of her uniting in certain deeds, and an agreement made to reimburse her. And the deed conveys several tracts of land situated in the counties of King William and King and Queen, and all of his personal property, all live-stock, all the corn in the barn, and all household and kitchen furniture, leaving nothing for his subsistence except by her bounty. And, as if this were not enough, the deed adds: "This to include all the personal property of every description now owned by me."

Now, if this deed was not made to prevent his creditors from recovering their debts, its provisions, if sustained, necessarily must accomplish that result; and, as we have seen, if voluntary, it must be held to be fraudulent as to them, because he was largely indebted at the time, and no provision is made for the creditors whatever.

It can only be sustained upon clear and distinct proof of a valuable consideration.

There is no satisfactory proof of any such agreement as that set up in the deed, when the answers and the deposition of Mrs. De Farges, and the recitals of the deed, have been rejected. The personal property received by the husband belonging to the wife became his by virtue of his marital rights, and the real estate is still held by the wife, and not affected by this suit.

There is proof of the declaration of the husband and wife which set up a claim to a provision on the part of the husband to reimburse the wife for such of her property as he may have used, but these prove nothing more than the answers, the effect of which we have considered, and are wholly inadequate to prove the alleged agreement.

There was the lapse of a long period of time between the marriage and the settlement, and there is not only no sufficient proof of the agreement to support the settlement, but it cannot be held to have been in pursuance of any agreement, and was obviously voluntary; and so it was correctly held to be constructively fraudulent as to the existing creditors of the husband. And the decrees complained of and appealed from here are without error, and must be affirmed.

WITNESSES — COMPETENCY — HUSBAND AND WIFE. — A husband is not competent as a witness, where his wife has an interest in the litigation: *Jackson v. Bolce*, 40 La. Ann. 273; 8 Am. St. Rep. 523, and note; *Schnabel v. Betts*, 23 Fla. 178; *Storrs v. Storrs*, 23 Fla. 274; *Shaw v. Schoonover*, 130 Ill. 443; *Way v. Harriman*, 126 Ill. 132; *Blanchard v. Moors*, 85 Mich. 380; *Baton v. Knowles*, 61 Mich. 625; *Harrington v. Sedalia*, 98 Mo. 583; *Bitner v. Boone*, 128 Pa. St. 567; *Sutherland v. Ross*, 140 Pa. St. 379; *Nicholas v. Austin*, 82 Va. 817; *Lindsay v. McCormick*, 82 Va. 479; *Norfolk etc. R. R. Co. v. Prindle*, 82 Va. 122; *Jones v. Degge*, 84 Va. 685; *Thornton v. Gaar*, 87 Va. 315. In actions to annul a post-nuptial settlement, neither the husband nor the wife can testify, no matter by which party introduced: *Witt v. Osburn*, 83 Va. 227; and to the same effect, substantially, is *Scott v. Rowland*, 82 Va. 484.

But the husband is competent in an action in which his wife is plaintiff as the executrix of a decedent, except as to communications made to each other during marriage: *Van Fleet v. Stout*, 44 Kan. 523; or in cases where the evidence is with respect to transactions in which he acted as her agent: *Council Grove etc. R'y Co. v. Center*, 42 Kan. 438; *Rope v. Hess*, 118 N. Y. 668; or in an action in which he has been joined as defendant, the controversy being with respect to his wife's land, of which, by the *ius mariti*, he has possession: *Brownles v. Fenwick*, 103 Mo. 420; or in an action by the assignee of himself and wife, of a cause of action against a carrier for injury to the wife's goods while in transportation: *Norfolk etc. R. R. Co. v. Read*, 87 Va. 185. A divorced husband may testify against his former wife, even as to facts coming to his knowledge during marriage, when such facts were equally accessible to others, and were not disclosures made to him in conversations with her: *Bigelow v. Sickles*, 75 Wis. 427. Under the Kentucky code, in "actions which might have been brought by or against the wife, if she had been unmarried, either the husband or wife, but not both, may testify": *Howard v. Tenney*, 87 Ky. 52. Compare *Pickens v. Kniskley*, 29 W. Va. 1; 6 Am. St. Rep. 622.

Nor is the wife competent to testify where her husband is interested: *Arn v. Matthews*, 39 Kan. 272; *White v. Vicksburg etc. R. R. Co.*, 42 La. Ann. 990; *Bell v. Throop*, 140 Pa. St. 641; *Witt v. Osburn*, 83 Va. 227. When the husband is not competent, by reason of his interest to testify, the wife also will be incompetent, in suits affecting the community: *Newton v. Newton*, 77 Tex. 508; *Walker v. Steele*, 121 Ind. 436. A wife claiming property as her separate estate against the creditors of her husband is not a competent witness in support of such claim: *Orabrees v. Dunn*, 86 Va. 953. But see *Blanchard v. Moors*, 85 Mich. 381.

But the rule that a wife shall not testify against her husband is founded upon their legal unity, and is inapplicable to actions in which the wife and husband have conflicting interests, such as divorce suits, actions by the

wife seeking protection against the husband, or equitable actions relating to the wife's separate estate: *Spier's Appeal*, 56 Conn. 184; 7 Am. St. Rep. 208; *Geogrove v. Creditors*, 41 La. Ann. 274. The wife may testify in her own behalf in a suit where her husband is merely a nominal party, having no real interest: *Thomas v. Sellman*, 87 Va. 683; *Williams v. Jacksonville etc. Ry Co.*, 26 Fla. 533.

VOLUNTARY CONVEYANCES, RIGHTS OF THE PARTIES THEREIN, and the validity thereof generally: See note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739-754.

HUSBAND AND WIFE — POST-NUPTIAL SETTLEMENTS. — A settlement between a husband and wife, after marriage, fairly made for a reasonable consideration in value, is good: *Barnett v. Goings*, 8 Blackf. 284; 44 Am. Dec. 766, and note; and valid against subsequent creditors: *Hester v. Wilkinson*, 6 Humph. 215; 44 Am. Dec. 303; note to *Houghton v. Houghton*, 77 Am. Dec. 72. A post-nuptial settlement is presumed to be voluntary, and not based upon a valuable consideration: *Robbins v. Armstrong*, 84 Va. 810; and therefore *prima facie* void as to pre-existing creditors: *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883. Husband and wife may contract for conveyances between themselves, which will be valid in equity; and though scrutinized with great care, such contracts will be always upheld, when found to contain certain essential requisites: *Hausman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74, and note. A post-nuptial contract which attempts to alter the legal descent of property is void: *Groesbeck v. Groesbeck*, 78 Tex. 664. The relinquishment of dower may be such a consideration upon which to base a post-nuptial settlement as will validate it against the existing creditors of the husband: *Strayer v. Long*, 86 Va. 557.

BOWEN v. BOWEN.

[87 VIRGINIA, 432.]

WILLS — CONSTRUCTION — FEE-SIMPLE. — When a will gives the legatee therein an estate for life, with power to sell, and to possess and enjoy it during life as if she enjoyed a fee-simple estate therein, with remainder to the testator's nephews and nieces, the legatee takes an estate in fee-simple absolute, and the remainder over is void for repugnancy.

Little and Little, and T. R. B. Wright, for the appellants.

Marye and Fitzhugh, and A. B. Rawlings, for the appellees.

LACY, J. The will, so far as it is involved in this controversy, is as follows: "After the payment of all my just debts, I give, devise, and bequeath to my wife, Adelaide Bowen, all my estate, real, personal, and mixed, for and during her life, and it is my wish and desire that my said wife may sell and convey my real estate and receive the purchase-money therefor; sell and use all my personal property, and buy and sell with the proceeds such property, for her own comfort and convenience, as she may choose, without accountability to

any person whatever. In fact, during the life of my said wife, I wish her to possess and enjoy the said property as if she enjoyed a fee-simple and absolute estate therein. If, however, at the death of my said wife any of the said property shall remain, I wish the same to be divided equally between all my nephews and nieces who may be living," etc.

The wife died intestate and childless, and the controversy is between the nephews and nieces of the testator and the next of kin and heirs at law of the deceased wife.

The question is, What estate did the wife, Adelaide Bowen, take under this will? The circuit court, construing the said will of William P. Bowen, decided that the said Adelaide Bowen, under the said will, took the absolute estate in fee-simple in said property, and that the "remainder to his nephews and nieces is repugnant and void." From this decree the appellants, who are the nephews and nieces, and those claiming under them, have appealed to this court.

The questions involved in this case are not new in this court, and, by what may be regarded as the settled rule of construction in such cases, the decree appealed from is plainly right. The whole will must be taken and considered together, and while the words "for and during her life," standing alone, would indicate an intention to give a life estate only, the subsequent provisions, "my said wife may sell and convey my real estate and receive the purchase-money therefor," and "sell and use all my personal property," "buy and sell with the proceeds such property, for her own comfort and convenience, as she may choose, without accountability to any person whatever," indicate a gift of the whole property. And the words, "In fact, during the life of my said wife, I wish her to possess and enjoy the said property as if she enjoyed a fee-simple and absolute estate," fully express a gift of the absolute property. So that she not only had the right to "sell and use all my personal property" (there was no real estate left by the testator), — a right of absolute disposal, — but she was to possess and enjoy a fee-simple and absolute estate therein. This was an absolute gift of the property. Then the added words, attempting to dispose of what had been already given, as, "if, however, at the death of my said wife any of the said property shall remain," the same to go to persons indicated, are inoperative and void for repugnancy. Nothing more than the whole can be given. Having given

all, nothing more remained in the testator to give; and his language, "if, however," etc., "any of the said property shall remain," indicates, and according to some of the decisions, standing alone, would be sufficient to indicate, an intention in the testator that his wife should have the absolute power of disposal, which is inconsistent with the gift of a life estate, or any limited estate less than the absolute property: See the case of *Hall v. Palmer*, 87 Va. 354; *ante*, p. 658, and the cases cited; *Brown v. George*, 6 Gratt, 424; *Missionary Soc. etc. v. Calvert*, 32 Gratt. 357; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251.

The cases cited by counsel as *per contra*, of *Johns v. Johns*, 86 Va. 333, and *Miller v. Potterfield*, 86 Va. 876, 19 Am. St. Rep. 919, are not in conflict, but are distinguished from this case and the cases cited by the circumstance that in *Johns v. Johns*, 86 Va. 333, the power of disposal was not absolute in the first taker, for her sole benefit, but also for the benefit of her children; and in *Miller v. Potterfield*, for the benefit, not of herself alone, but of a named beneficiary, William Garrett.

We are of opinion that the decree of the circuit court appealed from here is without error, and the same must be affirmed.

DEVISES — ESTATE IN FEE — REPUGNANCY. — Where a testator devised his property to his daughters absolutely, and further provided that the share given to one of them should be held in trust by the executor for her sole use and benefit during her natural life, and at her death the balance to go to her children, such daughter must take an estate in fee-simple, the limitation over being void for repugnancy: *Hall v. Palmer*, 87 Va. 354; *ante*, p. 658, and note.

LEE'S ADMINISTRATOR v. HILL.

[87 VIRGINIA, 497.]

SURVIVAL OF ACTIONS. — Where a cause of action is founded in tort, unconnected with contract, and affects the person only, and not the estate, the action dies with the person; but where the action is founded on contract, although nominally laid in tort, the action survives.

SURVIVAL OF ACTIONS — BREACH OF CONTRACT FOR PERSONAL SERVICES. — An action for breach of a contract of employment for personal services survives the death of the employer, and will lie, either in trespass on the case under the statute, or in *assumpsit* under the common law, against his personal representative.

STATUTE OF FRAUDS — CONTRACT FOR PERSONAL SERVICES. — An oral contract for personal services not to be performed within one year from its execution is within the statute of frauds, and void.

EVIDENCE — DEATH OF PARTY PENDING ACTION. — Where one of the parties dies pending the action, thereby rendering the other party incompetent to testify, statements made by him at the first trial may be proved at the second trial by the evidence of other witnesses.

TRESPASS on the case against the administrator of one Lee, brought by one Hill to recover for a wrongful discharge from Lee's service, in violation of a parol contract for personal services. Judgment for plaintiff, and defendant appealed.

H. E. Barksdale, for the appellant.

Pentross and Harris, for the appellee.

LEWIS, P. 1. The first question to be determined is, Did the circuit court err in reviving the action against the administrator?

At common law an action was abated by the death of either party, and could not be revived for or against the personal representative. If the cause of action survived, it was necessary to bring a new suit. This, however, has long since been altered by statute, and now, if the cause of action survives, the action may be revived. Whether, therefore, the present action was rightly revived depends upon whether or not the cause of action survives, and we are of opinion that it does.

The declaration, it is true, is in form *ex delicto*, but that *assumpsit* would lie for the injury complained of is undeniable. In such a case *assumpsit* and case are concurrent remedies; that is to say, an action *ex contractu* for the breach of the contract, or an action *ex delicto* for the breach of the duty, may be brought, at the option of the plaintiff. Nor is it disputed that if the plaintiff in the present case had declared in *assumpsit* the action would survive. The appellant, however, contends that the action died with his decedent, because, he says, in an action of tort the rule, *Actio personalis moritur cum persona*, applies. He contends that this is so at common law, and that the case is not within the statute now carried into section 2655 of the code, which provides that "an action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent." But this position we think is untenable.

It has sometimes been said that at common law all causes of action *ex contractu* survive; whereas all torts die with the person. But neither of these propositions is strictly accu-

rate. The general rule is, that rights of the former class do survive, but the rule is not universal. Thus, for instance, a breach of promise to marry, or a breach of the implied contract of a medical practitioner, or of an attorney, to exercise skill in his profession, and other injuries of a personal nature, although arising *ex contractu*, that might be mentioned, constitute exceptions to the rule, unless, indeed, some special damage to the personal estate can be stated on the record: 1 Lomax on Executors and Administrators, 286; 1 Chitty's Pleading, 68; *Chamberlayne v. Williamson*, 2 Maule & S. 408; *Grubb's Adm'r v. Sult*, 32 Gratt. 203; 34 Am. Rep. 765.

Nor do all actions in tort, at common law, die with the person. The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule, *Actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives.

This principle is illustrated by the case of *Powell v. Layton*, 5 Bos. & P. 365. That was an action of tort against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose. The defendant pleaded in abatement that his partners ought to have been joined. To this plea the plaintiff demurred, and, in support of the demurrer, insisted that the action was on the tort (i. e., the negligence of the defendant), and not on the contract, and therefore that it was not necessary to declare jointly against all the partners. But the court overruled the demurrer, holding that the form of the action could not alter the nature of the transaction, which had its origin in contract. And Mansfield, C. J., seemed to be of opinion that an action in that form — its foundation being essentially contract — would lie against the executor.

This subject was discussed in *Booth v. Northrop*, 27 Conn. 825, which was an action on the case for a false warranty in the exchange of cattle. Pending the action the plaintiff died, and the question was, whether the action survived to the administrator. The court unanimously held that it did, and in the course of its opinion used this language: —

"On the question of survivorship, we consider it immaterial whether the form of the remedy adopted is in tort or in con-

tract, provided the cause of action is founded on a contract. The form of action brought to redress a wrong sometimes, and indeed usually, indicates its nature, whether as arising independently of contract or not; but this is far from being invariably so, there being many cases where the action, the cause of which grows out of a breach of contract, may be in form either *ex delicto*, as in case, or *ex contractu*, as in *assumpsit*. In determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."

It is true, this court, in the earlier case of *Boyles's Adm'r v. Overby*, 11 Gratt. 202, decided differently. But the case was not argued on the losing side, and the decision was by a divided court, two of the judges dissenting. There the declaration was in case, and contained two counts. The first alleged a false warranty by the defendant's intestate in his lifetime in the sale of a slave. The second alleged a deceit in the sale of a slave by a fraudulent concealment of the unsoundness of the slave. The court were unanimously of opinion that the cause of action set out in the latter count, being both in form and substance *ex delicto*, died with the deceased; and a majority of the court were also of opinion that the same rule applied to the first count. It was not doubted that an action *ex contractu* would lie against the administrator for the false warranty, but it was held that an action in tort would not, and the principal reason assigned was, that the proof in the two classes of action would be different.

It is somewhat remarkable that there is no allusion in the majority opinion to the leading case of *Williamson v. Allison*, 2 East, 446, which established the contrary doctrine, and to which Judge Moncure referred in his dissenting opinion. That was an action in tort for a false warranty in the sale of certain goods, and the question before the king's bench was, whether the *scienter*, as laid in the declaration, was required to be proved. For the defendant it was contended, that while in an action of *assumpsit* such proof is not required, it was otherwise in an action *ex delicto*. But it was held that there was no such distinction. Lord Ellenborough, C. J., observed that an action in tort on the warranty broken was the ancient remedy in such cases, and that the modern practice of declaring in *assumpsit*, for the sake of adding the

money counts, had not then prevailed over forty years. But no other proof, in either form of proceeding, he said, was required than the warranty itself, and the breach of it; that it was sufficient to prove the warranty broken to establish the deceit, and that the form of the action could not vary the proof in that respect.

But whatever may be said as to the correctness of the decision in *Boyles's Adm'r v. Overby*, 11 Gratt. 202, the reasoning of the court has no application to the question before us, since in a case like the present, whether the action be, in form, in tort or in contract, the character of the proof and the measure of damages are confessedly the same.

It is sometimes said, on the supposed authority of Lord Mansfield in *Hambly v. Trott*, Cowp. 371, that where the declaration imputes a tort, and the plea must be not guilty, the action dies with the person. That was an action of trover, and what Lord Mansfield did say was this: "No action, where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be not guilty, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*." But by this was evidently meant torts committed with force, or, at all events, injuries other than those connected with contract, and for which case and *assumpsit* are convenient remedies; for it was immediately added, that "all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."

If, however, there were any doubt that the cause of action asserted in the present case survives at common law, it would seem clear that the action was rightly revived by virtue of the statute already alluded to: Code, sec. 2655. Under that statute, which is an extension of the statute, 4 Edward III., c. 7, *de bonis asportatis*, an action of trespass or trespass on the case may be maintained by or against a personal representative not only for the taking and carrying away of goods, but for any damage to estate, either done or suffered, by the decedent. It is a remedial statute, and is therefore to receive, as the English statute has always received, a liberal construction. It requires no very liberal interpretation, however, to extend its operation to the present case. The contract in question, as it is described in the declaration, was property, or specific personal estate. It gave the right, upon the performance of a stipulated service, to receive certain wages, or in other words, it was a chose in

action, which is comprehended within the term "estate." The word "estate," said the court in *Comegys v. Vasse*, 1 Pet. 193, is broad enough to cover every description of vested right and interest attached to and growing out of property. And by this court it has been declared to be among the most comprehensive words in legal terminology: *Williams v. Lord*, 75 Va. 390; *Norfolk etc. R. R. Co. v. Prindle*, 82 Va. 122.

It would be a novel doctrine to hold that a contract, whereby a man secures employment at remunerative wages for the support of himself and family, is not property, or that a violation of such a contract is not damage to his estate. It has been frequently decided that future wages may be legally assigned, where there is a present contract imparting to them a potential existence; and if such future wages may be assigned as property, would it not be absurd to deny that the contract itself is property or estate? See *Wade v. Bessey*, 76 Me. 413; *Taylor v. Lynch*, 5 Gray, 49; *Hartley v. Tapley*, 2 Gray, 565; *Emery v. Lawrence*, 8 Cush. 151; 3 Am. & Eng. Ency. of Law, 237, and cases cited.

The present case is distinguished from *Henshaw v. Miller*, 17 How. 212, upon which the appellant relies. In that case, which was an action on the case for a false representation as to the credit of another, whereby the plaintiff was induced to part with his property, it was held that the action died with the person; that the act complained of was not a direct, but only an indirect or consequential, injury to the plaintiff's property, and therefore not within the statute of Virginia, in which state the case arose. In other words, that it was a mere fraud or cheat, which, although it occasioned loss to the plaintiff, could not be regarded within the meaning of the statute as a damage to his estate; and in this view we concur: 3 Rob. Pr., N. S., 292 et seq.

There is no error, therefore, in the order reviving the action.

2. On the demurrer to evidence, however, the plea of the statute of frauds ought to have been sustained, and judgment given for the defendant. The contract in question was not in writing, and it appears affirmatively that it was not to be performed, and that it was not capable of being fully performed, within a year. The evidence for the defendant shows clearly that it was made in August, 1886, for one year's service, to commence on the 1st of October next ensuing; and as this is not in conflict with the plaintiff's evidence, it was not waived by the demurrer to evidence: 4 Minor's Inst. 749; *Trout v.*

Virginia R. R. Co., 23 Gratt. 619; *Southwestern Imp. Co. v. Smith's Adm'r*, 85 Va. 315; 17 Am. St. Rep. 59.

At the last trial the plaintiff was incompetent to testify, by reason of the death of the defendant's intestate. The defendant, however, introduced several witnesses to prove his (the plaintiff's) statement, as a witness at the first trial, to the effect that the date and terms of the contract were as above stated. This evidence was not objected to, and was clearly admissible: 1 Greenl. Ev., secs. 168, 171. There was no plea, however, of the statute of frauds at the first trial, and the judgment then rendered was reversed here on other grounds.

The plaintiff now seeks to avoid the effect of this evidence by contending that in November, 1886, just before his discharge by the deceased, there was a new contract. But there is nothing in the record to support this position. The evidence shows that a short while after the plaintiff entered upon his employment under the contract, the deceased threatened to discharge him, but afterwards changed his mind, saying he had concluded to keep him, and at the same time ordered him to North Carolina to canvass for trade. This was obviously not a new contract, but rather an implied declaration of an intention to fulfill the previous one; and as that was neither in writing, nor to be performed within a year, it followed that no action thereon can be maintained: Code, sec. 2840; 3 Parsons on Contracts, 36; *Seddon v. Rosenbaum*, 85 Va. 928; *Walker v. Johnson*, 96 U. S. 424; 1 Smith's Lead. Cas. 580, notes to *Peter v. Compton*.

The judgment will therefore be reversed, and an order entered here in conformity with this opinion.

SURVIVAL OF ACTIONS FOUNDED ON CONTRACT.—Actions founded on contract, where there is some wrong to the property, rights, or interests of another, survive the death of the wrong-doer: *Oregin v. Brooklyn etc. R. R. Co.*, 75 N. Y. 192; 31 Am. Rep. 459; *Winneegas v. Central etc. R'y Co.*, 85 Ky. 547; *Clark v. Manchester*, 62 N. H. 578; but the action will not survive when such injuries are personal in their nature: *Boor v. Lourey*, 103 Ind. 468; 53 Am. Rep. 519, and extended note, discussing fully the subject of survival of actions: *Varnum v. Townsend*, 23 Fla. 355; *Hamilton v. Jones*, 125 Ind. 176; *Corbett v. Twenty-third St. R'y Co.*, 114 N. Y. 579.

CONTRACTS—STATUTE OF FRAUDS.—A contract not to be performed within a year is within the statute of frauds, and must be in writing: *Pittin v. Noyes*, 48 N. H. 294; 97 Am. Dec. 615; *Lockwood v. Burnes*, 3 Hill, 128; 38 Am. Dec. 620, and note; *Bernier v. Cabot etc. Co.*, 71 Me. 506; 36 Am. Rep. 343; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205, and note; *Gordon v. Nieman*, 118 N. Y. 152. An oral contract for personal services not to be performed within a year is void: *Smith v. Theobald*, 86 Ky. 141; *Shemate v. Parlow*, 125 Ind. 359.

CORBIN v. PLANTERS NATIONAL BANK.

[87 VIRGINIA, 681.]

PRACTICE — DISCONTINUANCE OF ACTION. — The discontinuance of action provided by section 3396, Virginia Code, applies only to such defendants as are not served with process, and is inapplicable when all the defendants have been served.

NEGOTIABLE INSTRUMENTS — NOTES AND INLAND BILLS — EVIDENCE OF DISHONOR. — The rule that protest of a dishonored foreign bill of exchange is ordinarily indispensable, and that the notary's certificate of protest is *prima facie* evidence of presentment and non-acceptance or non-payment, does not extend to promissory notes and inland bills. As to these the protest is not regarded as an official act, and in the absence of statute, is not receivable as evidence of dishonor.

NEGOTIABLE INSTRUMENTS — NOTES AND INLAND BILLS — EVIDENCE OF DISHONOR. — The law of the state where an action is brought determines what is evidence of presentment and dishonor of promissory notes and inland bills of exchange.

NEGOTIABLE INSTRUMENTS — NEGOTIABILITY GOVERNED BY LEX LOCI CONTRACTUS. — Whether a note or inland bill of exchange is negotiable or not is governed by the *lex loci contractus*, although the remedy is governed by the *lex fori*.

NEGOTIABLE INSTRUMENTS — FOREIGN NOTES OR INLAND BILLS — EVIDENCE OF DISHONOR. — Where a promissory note or inland bill is payable in another state, the notarial certificate of protest thereof made in that state is not evidence of dishonor, in a suit brought thereon in the state of Virginia.

NEGOTIABLE INSTRUMENTS — FOREIGN NOTES OR INLAND BILLS — PRESUMPTION AS TO PROTEST. — In the absence of proof that the note or bill sued on in Virginia was protestable by the law of the state where it was made payable, the presumption prevails that it was not.

NEGOTIABLE INSTRUMENTS — NOTICE OF DISHONOR by the holder of a note or inland bill, to his indorser, where the parties reside in different places, and the notice is sent by mail, must be mailed in time to be sent the next business day after dishonor, if practicable.

ACTION on note. One Cobbs, of New York City, executed his negotiable note for three thousand dollars, payable ninety days after date, at that place. The note was indorsed by Cobbs, Corbin, and Flournoy, and discounted by the latter at the Planters Bank in Virginia two days after its execution, and the proceeds placed to his credit in the bank. The note was not paid at maturity, and was protested by a New York notary, whose certificate of protest was the only evidence of dishonor presented by the plaintiff bank. The bank then brought an action on the note against the maker and indorsers, and served process on all the defendants. Judgment was confessed by Flournoy, and taken by default against Cobbs, and a discontinuance was allowed as to Corbin. The present

action was afterwards commenced against Corbin alone on the note, and the insolvency of Flournoy and Cobbs alleged. In this action judgment was rendered against Corbin, and he appealed.

B. Green, and Christian and Christian, for the appellant.

Berkeley and Harrison, for the appellee.

LEWIS, P. The case presents several important questions of law, but their solution is free from difficulty.

The defendant, in support of the special plea, relies upon *Beazley v. Sims*, 81 Va. 644. But that case is not in point. The rule, moreover, announced in that case has been changed by the new code. That was an action against two joint obligors, in which process was served on one of the defendants only, and there was a judgment against that one, and a discontinuance as to the other. And in a subsequent action against both, it was held that the cause of action was merged in the judgment recovered in the first suit. Afterwards, however, the present code was adopted, section 3396 of which, after providing that where, in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all, goes on further to enact that "such discontinuance of the action as to any defendant shall not operate as a bar of any subsequent action which may be brought against him for the same cause."

It is obvious that the discontinuance provided for by this statute is a discontinuance as to any one or more defendants upon whom process has not been served, whereas here process in the first action was served on all the defendants, so that the case is not within the statute. It may be conceded, however, that the principle recognized in *Beazley v. Sims*, 81 Va. 644, would control this case if the first action could have been rightly maintained in this state against all the defendants. But clearly it could not, for their liability was not joint, but several, and the note sued on was not "payable at a particular bank, or at a particular office thereof for discount and deposit, or the place of business of a savings institution or savings bank, or at the place of business of a licensed banker or broker": Code, sec. 2853.

This being so, the next question is, whether upon the evidence which is set out in the bill of exceptions the bank was entitled to recover in the present action; and we are of opinion that it was not.

In the first place, there was no proof of the dishonor of the note. By the law merchant, which is a part of the common law, protest of a dishonored foreign bill of exchange is ordinarily indispensable, and the notary's certificate of protest proves itself; that is, it is *prima facie* evidence of presentment and non-acceptance or non-payment. But the rule does not extend to promissory notes and inland bills. As to these, the protest is not regarded as an official act, and accordingly, in the absence of statute, is not receivable as evidence of dishonor: 2 Daniel on Negotiable Instruments, sec. 928; *Young v. Bryan*, 6 Wheat. 146; *Union Bank v. Hyde*, 6 Wheat. 572; *Nicholls v. Webb*, 8 Wheat. 326; *Dunn v. Adams*, 1 Ala. 527; 35 Am. Dec. 42; Story on Promissory Notes, sec. 297. And, where a state statute makes the certificate of protest, when executed by a notary of that state, evidence of dishonor in such cases, it does not authorize the notary to act beyond its territorial limits, or accord the same effect to his act when beyond them: 2 Daniel on Negotiable Instruments, sec. 959; note to *Tate v. Sullivan*, 96 Am. Dec. 608.

Parsons states the common-law rule as follows: "In the case of foreign bills protested in a country other than that in which the suit is brought," he says, "full faith and credit are given to the instrument of protest; and the original or a duly certified copy are admissible in evidence of the acts therein stated, so far as those acts are within the scope of a notary's official duty. In the case of inland bills, and even foreign bills which are protested in the country where suit is brought, the protest is not admissible in evidence, unless the notary has deceased since the protest was made": 1 Parsons on Notes and Bills, 635.

The whole subject, however, as he goes on to say, is very generally regulated in this country by statute, and so it is in Virginia. The question, therefore, as to the effect of the certificate of the New York notary, which was the only evidence offered in the present case as to the dishonor of the note sued on, must be determined in accordance with the statute law of this state; for it is conceded that as to this matter the *lex fori* governs.

It is contended by the defendant, the plaintiff in error here,

that the court below erred in treating the note sued on as negotiable. But we do not concur in this view. It is a general rule that every contract, as to its validity, nature, interpretation, and effect, is governed by the law of the place where it is made, unless it is to be performed in another place. Accordingly, it was decided in *Freeman's Bank v. Ruckman*, 16 Gratt. 126, that whether a note is negotiable or not is a question which relates to its nature and effect, and is therefore to be governed by its *lex loci contractus*, although the remedy is governed by the place where the suit is instituted. Hence the note sued on in the present case, having been executed and made payable in New York, where it is conceded it was negotiable, it was properly so treated by the court below.

But, as already stated, the only evidence of its dishonor was the certificate of the New York notary, and that, according to the statute of this state, was not evidence for the purpose for which it was offered. The note was payable, not in this state, but in New York, and is therefore not within our statute permitting the protest of promissory notes and inland bills, which applies only to such notes as are payable in this state, at a particular bank, or at a particular office thereof for discount and deposit, etc., and as to which the protest is made *prima facie* evidence of what is stated therein: Code, secs. 2849, 2850; *McVeigh v. Bank of Old Dominion*, 26 Gratt. 785, 829.

The legislature has not seen fit to make the notarial certificate of protest of a promissory note, or of an inland bill, payable outside of the state, admissible in evidence in our courts as an official act, and we have not the power, even if we were so disposed, to give to it an effect not sanctioned either by the common law or by the statute. Besides, there is no proof that the note sued on was a protestable security by the laws of New York, and in the absence of any such proof, the presumption is that it was not: *Dunn v. Adams*, 1 Ala. 527; 35 Am. Dec. 42.

There is no proof, moreover, of due notice to the defendant of the dishonor of the note. Although there has been a diversity of opinion among judges as to what is reasonable time within which notice must be given by the holder to his indorser, it is settled that where the parties reside at different places, and notice is sent by mail, it should be mailed in time to be sent the next business day after dishonor, if practicable, at the latest. "Where the notice is sent by post," says Green-

leaf, "it need not be sent on the day of dishonor, but it should go by the next practicable post after that day, having due reference to all the circumstances of the case." Notice may also be sent by a special messenger, and it will be sufficient if it reaches the party on the same day that it would have reached him in due course of mail: 2 Greenl. Ev., sec. 187; 1 Parsons on Notes and Bills, 511; 2 Daniel on Negotiable Instruments, secs. 1033, 1039, 1043.

And the general rule is, that each successive party who receives notice of dishonor is entitled to a full day to transmit it to any antecedent party who is chargeable over to him upon payment of the bill or note: 2 Daniel on Negotiable Instruments, sec. 1044.

In the case at bar, the only evidence on the point of notice is that of Quarles, cashier of the bank, who testifies that notices of protest were received by him from New York on Monday, October 17, 1887, and that on the same day he mailed a copy to the defendant at Danville. The note matured on Friday, the 14th of October, and there is no evidence whatever either as to the time when the notices were mailed in New York, or as to the usual course of the mail between that city and Richmond. For aught the record shows, the notices may have been mailed on Sunday, the 16th, or on Monday, the 17th, and if not mailed before that time, it was too late to avail.

The rule is well expressed by Parsons, who says that "the burden of proving due notice is upon the plaintiff, whose duty it is to give it in a way capable of proof. It should also be proved distinctly. Thus if the witness says the notice was sent in two or three days, and two are enough, but three not, and there is nothing to define this testimony, it will not be sufficient evidence to find a verdict for the plaintiff": 1 Parsons on Bills and Notes, 516. And in *Friend v. Wilkinson*, 9 Gratt. 81, it was decided that not only is the burden of proving notice on the plaintiff, but that where notice is required, it is a condition precedent to a recovery, and that he must show a strict compliance with the rule. Hence it was held incumbent on the plaintiff in that case to show that notice of protest was duly placed in the post-office to be mailed, and this not having been done, and there being no proof that the defendant duly received notice, the judgment of the lower court in favor of the plaintiff was reversed.

The application of these elementary principles to the present case shows very clearly, we think, that the judgment here

complained of must be reversed, and a judgment entered for the defendant.

NEGOTIABLE INSTRUMENTS — INLAND BILLS — NECESSITY FOR PROTEST. — Protest is not necessary, to fix the liability of an indorser of an inland bill or promissory note: *Stephenson v. Dickson*, 24 Pa. St. 148; 62 Am. Dec. 369; extended note to *Dupré v. Richard*, 43 Am. Dec. 219; *Pritchard v. Smith*, 77 Ga. 464; *Wilkie v. Shandon*, 1 Wash. 355; note to *Strawbridge v. Robinson*, 50 Am. Dec. 422.

NEGOTIABLE INSTRUMENTS — COLLECTION OF PROMISSORY NOTES AND INLAND BILLS — LEX FORI. — Promissory note made and payable in one state is to be treated as a note of that state, and all rights, duties, and obligations growing out of it are determined by the laws of that state: *Peck v. Hibbard*, 26 Vt. 698; 62 Am. Dec. 605; *Bryant v. Edson*, 8 Vt. 325; 30 Am. Dec. 472; *Kopelke v. Kopelke*, 112 Ind. 435.

NEGOTIABLE INSTRUMENTS — NEGOTIABILITY — LEX LOCI CONTRACTUS. — The negotiability of notes is governed by the place of their execution: *Olarb v. Searight*, 135 Pa. St. 173; 20 Am. St. Rep. 868, and note; *Dunnigan v. Stevens*, 122 Ill. 396; 3 Am. St. Rep. 496, and note; *Kuensi v. Elvera*, 14 La. Ann. 391; 74 Am. Dec. 434, and note.

NEGOTIABLE INSTRUMENTS — FOREIGN BILLS — PROTEST AS EVIDENCE OF DISHONOR. — A notary's protest of a foreign bill of exchange presented for payment is not conclusive evidence of its dishonor: *Sulzbacher v. Bank of Charleston*, 86 Tenn. 201; 6 Am. St. Rep. 828. Protest as evidence generally: See extended note to *Tate v. Sullivan*, 96 Am. Dec. 602-612.

NOTICE OF DISHONOR OF BILL OF EXCHANGE MAILED IN TIME WHEN. — A notice of the protest of a bill of exchange mailed the next day after the protest is made is mailed in time: *Brown v. Jones*, 125 Ind. 375; 21 Am. St. Rep. 227, and note; notice must be given within a reasonable time: *Turner v. Iron etc. Mining Co.*, 74 Wis. 355.

GODDIN v. BLAND.

[87 VIRGINIA, 706.]

EQUITY JURISDICTION — ACCOUNT. — Equity has no jurisdiction in cases of account, where the remedy at law is complete and adequate. Hence when one is employed to buy wood at a fixed price per cord, and the only issue in dispute is the amount bought and the sum due, equity has no jurisdiction to enjoin an action at law brought to recover such sum, although the account is long, and much of it is disputed.

J. F. Hubbard, for the appellant.

Pollard and Sands, for the appellees.

LACY, J. The case is as follows: In 1884, Bland and Brother, residents of King and Queen County, in Virginia, employed Sylvanus Goddin, a resident of the county of New Kent, in the same state, to purchase for them poplar cordwood in the counties of New Kent, Charles City, James City,

and York, situated in what is known as the "Peninsula," in this state, lying between the James River and the York River, and its affluent the Pamunkey River, at an agreed price, to be delivered by the vendors thereof, to the said Bland and Brother, at the river and creek landings in that section, on board of vessels and barges to be there provided by Bland and Brother to receive the same, Goddin to receive twenty-five cents per cord for his compensation for buying the said wood, the said Bland and Brother, the appellees, to advance to those persons so selling them wood \$1.50 to pay for cutting and delivering this wood at the landing, to be paid for in full by the said appellees as it should be put on board of the vessel or barge. A large quantity of wood was purchased by Goddin for the said appellees,—enough, by his claim, to bring his compensation up to \$1,597.10, at twenty-five cents per cord. The appellees not making payment of this claim of Goddin at request, in June, 1885, the said Goddin brought, in New Kent County, his action of *assumpsit* against the said Bland and Brother, to which action the said defendants pleaded in abatement to the jurisdiction of the court, upon which issue was joined, and a jury sworn to try the said issue, and the evidence was partly heard, and the arguments of counsel were partly had, when the defendants withdrew this plea, and pleaded *non assumpsit*, and issue was joined upon this plea, and the cause continued. Subsequently, and before final judgment in this suit at law in New Kent, in the year 1886, the defendants in that suit brought their bill in chancery in the adjoining county of King William, wherein the foregoing contract for the purchase of cord-wood was set forth, and the delivery of 2,672½ cords of wood is set forth, by which it is admitted that Goddin is entitled to receive \$668.10 as compensation for his services, whereas he is claiming against the said Bland and Brother the larger sum of \$1,529.34, on account of his services in buying cord-wood, at twenty-five cents per cord, and that this large difference is caused by the act of Goddin in charging for large quantities of wood never really delivered; and that said Goddin should not be allowed to proceed with his said suit at law now pending and undetermined in New Kent County,—1. Because long and intricate accounts are involved; 2. Because he has been paid \$200 for his services, of which he has rendered no account; 3. Because it is still undetermined what amount of wood the said plaintiffs, Bland and Brother, will have to account for; and

4. Because the case involves the trial of at least twenty-five cases of dispute, and that irreparable mischief will be done if the common-law action is allowed to proceed (no discovery is sought, but answer under oath is waived), and that said Goddin be enjoined from prosecuting his suit, etc. The injunction was awarded, an account ordered and taken, and a decree made substantially in accordance with the views set forth in the plaintiffs' bill, and Goddin appealed to this court.

The first ground of error assigned here is, that the bill should have been dismissed, because a court of equity was without jurisdiction in the premises, the remedy at law being adequate and ample; that the ground for relief sought by the bill against the action pending at law does not come within any of the recognized heads of equity jurisdiction, there being neither accident, mistake, forfeiture, mutual or very complicated accounts, fraud, discovery, nor trusts. It is true, an account is prayed for, and it is conceded that the jurisdiction of equity in matters of account is among the most comprehensive of those which it has assumed. Yet it is not every case of account of which a court of equity has jurisdiction. As has been said: Although I run up an account at a store, my merchant cannot as a matter of course sue me before that tribunal; to entitle him to proceed there, he must show some ground of interference, such as fraud, the necessity of discovery, complications in accounts, or such like: 2 *Tucker's Commentaries on the Laws of Virginia*, 409; *Lord Courtney v. Godschall*, 9 Ves. 473; or upon the ground that courts of law cannot give a remedy, or cannot give so complete a remedy as equity: *Smith v. Marks*, 2 Rand. 452.

In this case the dispute was as to the quantity of wood delivered to the plaintiffs, actually or constructively, pursuant to their contract. The plaintiffs stated it as set forth in their bill; the defendant, Goddin, claimed pay for over six thousand cords of wood purchased pursuant to the contract above referred to. While these figures may be admitted to be large, the question is at least one of fact, to be proved by legal evidence, and involved a single issue. No discovery was sought, and no account was involved which was in any degree complicated, and there were no mutual accounts in dispute, as the plaintiffs had kept and the defendant did not dispute the account of their payments on the account. The simple and single question in dispute was as to the quantity of cord-wood purchased and delivered, actually or constructively, pursuant

to the contract. There was no such relation of principal and agent as justified the interference of a court of equity. The account between Goddin and his principal was not in dispute. The mere relation of principal and agent was not sufficient, there being no trust or fiduciary element in the relation here. The relation was and is rather that of employer and employee. And the action of the employee for his hire is properly cognizable in a court of law, and there the plaintiffs could, under the plea of *non assumpsit*, avail of every defense which they have really interposed in their present suit in equity. And the bill of the plaintiffs should have been dismissed, and the parties left to liquidate their dispute in the pending action at law in the circuit court of New Kent. We have been cited by the learned counsel for the appellants to 3 Pomeroy's Eq. Jur., sec. 1421; *Coffman v. Sangston*, 21 Gratt. 269; *Marvin v. Brooks*, 94 N. Y. 76. See also Barb. Ch. Pr. 12, 13; *Terrell v. Dick*, 1 Call, 546; *Alderson v. Biggars*, 4 Hen. & M. 471; *Barratt v. Floyd*, 3 Call, 531; *Campbell v. Rust*, 85 Va. 665, opinion of Richardson, J., and cases cited; *Penn v. Ingles*, 82 Va. 65; *Tillar v. Cook*, 77 Va. 481. The case presents no ground whatever for equitable jurisdiction, and should have been dismissed at the hearing, and the decree of the circuit court of King William, granting the relief prayed for, and perpetually enjoining the defendant, Goddin, from proceeding with his action at law in the circuit court of New Kent, is erroneous, and will be reversed and annulled, and the bill dismissed. But as the case in New Kent, at law, must be tried upon the legal evidence there to be adduced, we will express no opinion upon the merits, upon the evidence adduced in this case. And such decree will be rendered here as the said circuit court of King William should have rendered, and the bill of the plaintiffs dismissed, with costs.

Decree reversed.

EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW. — Where there is a civil wrong without a remedy at law, equity will take jurisdiction, in order that what is right may be done: *Britton v. Supreme Council*, 46 N. J. Eq. 102; 19 Am. St. Rep. 376; but where the party has an adequate remedy at law, courts of equity will not ordinarily entertain jurisdiction: *Turner v. Hart*, 71 Mich. 128; 15 Am. St. Rep. 243, and note; *Alley v. Chase*, 83 Mo. 537; *Leas v. Merrill*, 19 Or. 545; *Salisbury G. Co. v. Salisbury*, 128 Pa. St. 250; *Thomas v. Musical etc. Union*, 121 N. Y. 45; *Compton v. Patterson*, 28 S. C. 115; *Solomons v. Shaw*, 25 S. C. 112; *Jameson v. Emerson*, 82 Mo. 359; *Wilson v. Hart*, 98 Mo. 618; *Grimmett v. Gingrass*, 77 Mich. 300.

GARLAND v. GARLAND.

[87 VIRGINIA, 758.]

SPENDTHRIFT TRUSTS — WILLS EXEMPTING BEQUESTS FROM EXECUTION. —

If a testator by his will sets apart real and other property in the hands of his executor, to be by him held in trust for the testator's brother, declaring that the profits of such property are set apart under the superintendence of the executor for the use of the brother, but that neither the estate nor profits "shall be bound for his past debts, or future debts or liabilities other than decent and comfortable support," and at his death that the property shall pass to C. Y. M., the beneficiary does not take any absolute property in the profits of the estate which he might have assigned or aliened, nor can such profits be reached by a creditor's bill against him.

William J. Robertson and Edward S. Brown, for the appellants.

Diggs and Manson, R. G. H. Kean, and E. O. Burks, for the appellees.

HINTON, J. As the case was presented on the former appeal, it appeared that William H. Garland, executor of Burr Garland (deceased), had brought a suit in the proper court in Mississippi, to settle the administration accounts of his testator as administrator *cum testamento annexo* of Samuel Garland, Sen., deceased; that the court in Mississippi ascertained the amount due to be \$64,130.88, and decreed that the domiciliary executor, the said William H. Garland, should pay the same to John F. Slaughter, who had qualified in Virginia as administrator *de bonis non cum testamento annexo* of the said Samuel Garland, Sen. Burr Garland died in Virginia in December, 1869. On his death there was found in the hands of John T. Murrell, in Lynchburg, Virginia, the sum of \$1,421.52, which was the remains of a sum of money said Burr Garland had deposited with him, on call, and subject to his, Burr Garland's, order. It also appeared that when Burr Garland died, he was in possession of certain conveyances or assignments to himself from several legatees of the said Samuel Garland, Sen., who were children of Nicholas Garland, a brother of the testator, of the legacies given to them in the will of Samuel Garland, Sen. Slaughter being unable, by reason of Burr Garland's insolvency, to make the money decreed by the Mississippi court in that state, and finding these assets in Virginia, brought suit in Virginia to enforce the Mississippi decree. To that suit Charles Y. Morris, administrator with the will annexed of

Burr Garland, deceased, and Mary Garland, his surety, were made defendants.

Upon this state of facts, this court held that the decree of the Mississippi court must be accepted as final and conclusive evidence of the fact and amount of indebtedness by Burr Garland, the Mississippi administrator of Samuel Garland, to Samuel Garland's estate. And further, that the decree of that court did not undertake to distribute it, nor to determine who are entitled to receive it under Samuel Garland's will, but decreed it to be paid over to the Virginia domiciliary executor, to be by him distributed to those entitled according to the declared intention of the testator; "but this decision is without prejudice to any right of action which Paulina B. Morriss may have in this or in an independent suit." When the case got back to the circuit court, the plaintiff filed his amended bill, making Paulina B. Morriss and her children parties.

After the case had been matured for hearing, on application for an order directing accounts, the court proceeded to construe the ninth clause of the will of Samuel Garland, Sen., upon the true construction of which the present controversy must turn.

That clause is in these words: —

"9. My favorite brother, B. Garland, raised by me, and long a resident of Mississippi, is, and has for a long time past been, embarrassed in debt by losses of trade in 1837, and liabilities as surety for others. It might be unsafe to devise property to him absolutely. I therefore set apart, in trust, in the hands of my executor, for the benefit of my said brother, either of my plantations in Hinds County, called 'Barrens' or 'Tudor Hall,' whichever he may choose, and forty slaves in families, — say about twenty-five hands, balance heads of families, children, and house-servants, to be selected out of the stocks on both places, — mules, horses, stock, etc., sufficient for the cultivation of the place so selected by him, with provisions, house and kitchen furniture, plantation tools, etc., oxen, hogs, etc., to make a complete estate. The profits of the estate is set apart for his (B. Garland's) use under his superintendence. But neither the estate or profits shall be bound for his past debts, or for future debts or liabilities other than decent and comfortable support. At his death all the property in this clause is to pass to Charles Y. Morriss,

in trust, to the separate use of his wife, Paulina B. Morris, and her children."

The circuit court was of opinion, and decreed, "that the estate of the said Burr Garland in the profits set apart by the said clause for the use of the said Burr Garland became, and was, under the law and by virtue of said will, his absolute estate, and, as such, liable not only for such debts as might be contracted for his decent and comfortable support, but for all his debts; and the said profits did not, nor did any part thereof, pass under the said will to the said Charles Y. Morris, in trust for the separate use of the said Paulina B. Morris and her children, nor did they, or either of them, acquire any estate or interest therein under the said will."

This, however, is not, in our opinion, the interpretation to be put upon the clause of the will now under review.

Burr Garland, as the very first words of this clause of the will says, was the favorite brother of the testator, by whom he had been raised. He had become so involved in debt by reason of losses in business, doubtless occasioned by the financial panic of 1837, and by liabilities incurred as surety for others, that it appeared to the testator practically impossible for him ever to free himself from this load of debt. In this condition the testator saw that an absolute gift or devise of property to him would be of no service to him, but would, in effect, be a gift of so much property to his creditors, who had not the slightest claim upon the testator. He therefore endeavored by a carefully devised trust to protect his brother in his declining years from penury and want by giving him the mere right to "a decent and comfortable support" out of the profits of an estate the legal title to which, as well as to the profits, he is careful to confer upon the trustee. And having made this provision for his brother, — a provision strictly limited to the use of so much of the profits as was necessary for "a decent and comfortable support," — and having declared that neither the estate or profits shall be bound for his past debts or liabilities, or for future debts incurred on any other account, he gives all the property in this clause, clearly meaning the estate and any surplus profits, over to Charles Y. Morris, in trust, to the separate use of his wife, Paulina B. Morris, and her children.

Now, this being the purpose of the testator, too clearly manifested to require any verbal criticism upon the mere words of the will, the only remaining inquiry is, whether this intention

shall be allowed to prevail, or, to express the same idea differently, whether there is any rule of the court of chancery in this state which defeats it.

On behalf of the appellees, it is insisted that the testator by his will gave to Burr Garland the profits therein mentioned, absolutely, and that the exemption of the profits from liability for Burr Garland's debts is void, because they say that it is a fundamental doctrine of the English chancery, and that the same rule prevails in America, that no such estate can be deprived of the incident of alienability or liability for the debts of the owner.

But this argument seems to me to be beside the mark.

In this case the devisee and legatee, Burr Garland, did not take any absolute property in the profits of the estate which he might have assigned or aliened, but on the contrary, he acquired the mere, although exclusive, right to a perception of so much of said profits as would furnish a decent and comfortable support for himself, and this was so qualified and limited as to fence out all his creditors, except those who furnished him supplies for his support. Had he undertaken to expend these profits in any other way, he would have been guilty of a breach of trust, for there was, in the eye of a court of equity, as complete a trust in him to apply these profits in this one direction as there was in the trustee to hold the legal title. And while he, Burr Garland, took this qualified right, which we think it is a misnomer to call property, the remaindermen took a vested remainder in all the surplus or unexpended profits. It admitted that this exact question has never been decided in Virginia, although several cases have arisen in this state where the trusts were held to be blended, and therefore that donee had interest that was divisible from the other *cestuis que trust*, and therefore no property that could be subjected to his debts.

But in *Nickell v. Handly*, 10 Gratt. 336, Judge Samuels, delivering the opinion of the court, said: "There is nothing in the nature or law of property which could prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relations; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relations. There is nothing in law or reason, I conceive, which should prevent her from appointing an agent or trustee to administer her bounty."

But the question has been carefully considered by the su-

preme court of the United States in the case of *Nichols v. Eaton*, 91 U. S. 716, and by the supreme court of Massachusetts in the case of *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, and in each case it was held that there was nothing in the doctrines of the American chancery which prohibits a trust like the present.

The reasoning of these cases commends itself to our judgment, and fully establishes the validity of this trust.

The decree of the court below, being in conflict with these views, must be reversed, and the cause must be remanded for further proceedings to be had in accordance with this opinion.

SPENDTHRIFT TRUSTS.—Trusts and devises to withdraw property from execution are considered in section 189 a of Freeman on Executions, in the language following: "The efforts of the owner of property to withdraw it from execution against him, while he retains some beneficial interest therein for himself or his family, would undoubtedly be met and counteracted by the statutes and decisions denouncing all conveyances and devises the design or operation of which is to hinder, delay, or defraud creditors. Each debtor is under both a moral and a legal obligation to pay his debts, and he cannot be permitted to evade such obligation by creating any trust for the benefit of himself or his family. But while a parent is under no obligation to pay either the present or future debts of his child, he ought to feel a solicitude for its future welfare, and a desire to guard it against future penury. The greater the incapacity or improvidence of the child, and the consequent probability of its becoming subject to obligations which it is unable to meet by its own efforts, the greater ought to be the solicitude and forethought of the parent in making some provision for its maintenance and comfort which will elude or withstand the efforts of its creditors, whether such efforts are confined to ordinary proceedings under execution, or are aided by such powers of chancery as can be evoked by a creditor's bill.

"Where statutes have not been enacted subjecting all equitable estates to execution, property may be withdrawn from execution at law by making it the subject of some active trust; but in that event it may be reached by a creditor's bill. The question we propose to consider is, What, if anything, will place property beyond the reach of the creditors of the beneficiary, whether proceeding at law or in equity? A direct devise or conveyance, with a provision forbidding alienation by the devisee or grantee, or declaring that the property shall not be subject to execution, cannot withdraw the property from execution, for the prohibition does not operate to divest the debtor's estate and vest it in another, and while he retains the whole beneficial estate, it must carry with it the power to dispose of the property by transfer, whether voluntary or involuntary: *Bridge v. Ward*, 35 Wis. 687; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241. On the other hand, it is now clear that the property may be withdrawn from creditors by so limiting its possession and enjoyment that the estate or interest of the beneficiary or grantee will terminate on his becoming insolvent or bankrupt, or on an attempt being made to seize the estate for the benefit of his creditors: *Joel v. Mills*, 3 Kay & J. 458; *Rockford v. Hackman*, 9 Hare, 475. Thus

where an annuity was given to the testator's nephew during his natural life, to be paid to him only and upon his receipt, and expressing an intent that the annuity should not be alienated, and if alienated, that it should immediately cease and determine, and the nephew was adjudged a bankrupt, and his assignees in bankruptcy sought to recover the annuity, it was held that there could be no recovery, because by the alienation consequent upon the adjudication of bankruptcy the annuity had ceased: *Dommatt v. Bedford*, 3 Ves. Jr. 149. A testator devised certain real estate to trustees, with power to dispose of the same, and after paying certain charges out of the proceeds, to invest the residue, and of the income to be raised out of such investments one moiety was to be paid to his son and the other to his daughter; and the testator directed 'that in case his son should, at any time or times, make any assignment, mortgage, or charge of or upon, or in any manner dispose of, by way of anticipation, the said interest, dividends, or accumulations, or any part thereof, or attempt or agree so to do, or commit any act whereby the same or any part thereof could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person or persons, then in any of such cases the said trustees should henceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of his said son, and any wife or child or children he might have, and for the education of such issue, or any of them as his trustees for the time being should, in their discretion, think fit.' The son became a bankrupt. Whereupon a bill was filed by his assignee in bankruptcy for a decree to compel the trustees to pay them the moiety to which the son would have been entitled had the fiat in bankruptcy not issued against him. But the prayer of the bill was denied, on the ground that, after the commission of the act of bankruptcy, the son retained no interest in the property: *Godden v. Crowhurst*, 10 Sim. 643.

"A will, wherein the testatrix devised her estate to trustees for the benefit of her sons, 'contained a provision that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will, concerning so much thereof as would so vest, should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife and child, as the case might be, of such son; and in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund': *Nichols v. Eaton*, 91 U. S. 718. This provision was sustained as against the claims of the assignee in bankruptcy of one of the sons.

"If property is conveyed or devised to trustees, who are vested with a discretion, in case they see fit, to apply the income or proceeds for the benefit or support of the beneficiary, he has no interest which can be reached by creditor's bill. As he had no power to compel the trustees to act for his benefit, his assignee or creditors can have none: *Twopenny v. Peyton*, 10 Sim. 487; *Leavitt v. Beirne*, 21 Conn. 1; *Hall v. Williams*, 120 Mass. 344. It must therefore be conceded that property may be withdrawn from the reach of the creditors of the beneficiary by limiting his estate so that it will be terminated by his alienation, voluntarily or involuntarily, or by vesting it in trustees who have a discretion to apply it for his benefit, or not. The vice of each of these methods is, that it involves the beneficiary and his creditors

in common ruin; for while it thwarts the efforts of the creditors, it leaves the intended beneficiary either without any estate, or dependent on the caprice of the trustees. Hence efforts have been made to devise other trusts under which the beneficiary may retain some absolute rights, notwithstanding his subsequent bankruptcy. These efforts have generally proved futile in England, but have met with encouraging success in the United States, as will more fully appear from a reference to the leading cases upon the subject. In the case of *Brandon v. Robinson*, 18 Ves. Jr. 429, it appeared that Stephen Goem had devised and bequeathed his estate to trustees to sell, and to divide or otherwise apply the produce to the use of all his children living at his decease, in equal proportions, and he directed with reference to the eventual interest of his son Thomas that it should be laid out in public funds or securities, and that the dividends should be by the trustees, from time to time, paid to the son on his proper order and receipt, 'subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments,' and that, upon his decease, the principal of his share, with all accrued dividends, should be applied by the trustees to the benefit of such persons as, in course of administration, would be entitled to his personal estate. After the death of the testator the son became a bankrupt, and the surviving assignee, under the commission in bankruptcy, applied for the execution of the trust by the taking of an account and the payment to him of the son's interest. The Lord Chancellor Eldon sustained the bill of the assignee, saying: 'There is no doubt that property may be given to a man until he shall become a bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. A like decision resulted from an annuity which trustees were directed to pay to the testator's son for life, the testator having declared, with respect to such annuity, that it was intended for the personal maintenance and support of the son during the whole of his life, and that it should not on any account be subject 'to the debts, engagements, charges, or encumbrances of him, my said son': *Graves v. Dolphin*, 1 Sim. 66.

"The case of *Snowden v. Dale*, 6 Sim. 525, is an extreme one. An assignment was made to trustees of two mortgage sums, aggregating two thousand pounds. Of this sum they were directed to hold eight hundred pounds in trust during the life of J. D. H., 'or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times; and in such sum or sums, portion or portions, as they should judge proper and expedient, to allow and pay the interest of the eight hundred pounds into the proper hands of the said J. D. H., or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessaries; but so that he should not have any right, title, claim, or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper, expedient, and so that no creditor of his should or might have any lien or claim thereon in any case, or the same be, in any way, subject or liable to his debts, dispositions, or engagements.' The will further provided that in the event of the death of J. D. H., leaving a widow, the trustees should pay the interest to her, and after the decease of him or

his widow, the eight hundred pounds, and all accumulations thereof, should be held in trust for the benefit of his children. It was held, as there was no provision made for the disposition of the fund to some other person than J. D. H. during his lifetime, that his interest therein vested in his assignee in bankruptcy; See *Younghusband v. Gisborne*, 1 Coll. C. C. 409; *Page v. Way*, 3 Beav. 20.

"In several of the United States the English decisions upon this subject have been followed without hesitation. Thus in *Smith v. Moore*, 37 Ala. 327, funds devised to T. H. S., in trust for W. G. S., 'not subject to any debts he may have contracted, but for his comfort and support; and should he depart this life before receiving the same,' then to be equally divided with testator's other children, were held so be subject to a bill filed by the creditors of the beneficiary. A like decision was pronounced in Georgia, where a devise had been made to a trustee of property, to be managed and controlled by him for the use and benefit of testator's son, who was restricted 'in his expenses to the income arising from said property,' and it was further provided in the will 'that said property shall not be liable for the debts or contracts of testator's said son, except when made and entered into by the written consent of the trustee': *Gray v. Obear*, 54 Ga. 231.

"The states of California, North Carolina (*Kennedy v. Numan*, 52 Cal. 328; *Mebane v. Mebane*, 4 Ired. Eq. 181; 44 Am. Dec. 102; *Pace v. Pace*, 73 N. C. 119), South Carolina (*Heath v. Bishop*, 4 Rich. Eq. 46; 55 Am. Dec. 654), Rhode Island (*Tillinghast v. Bradford*, 5 R. I. 205), and perhaps Missouri (*Mellevaine v. Smith*, 42 Mo. 45; 87 Am. Dec. 295), are also committed to the English rule that a debtor cannot retain any beneficial interest beyond the reach of a creditor's bill. Unless it is limited over to some other beneficiary, the voluntary and involuntary disposition of it cannot be inhibited. Until recently, the supreme court of the United States entertained like views. Mr. Justice Swayne, delivering the opinion of that court in *Nichols v. Levy*, 5 Wall. 441, thus tersely and lucidly expressed them: 'It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary, and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go.' But the views thus expressed were unnecessary to the decision of the case then before the court, and were not entertained by that great tribunal, when at a later day, and doubtless upon more mature consideration, it came to decide the case of *Nichols v. Eaton*, 91 U. S. 725, followed in *Hyde v. Woods*, 94 U. S. 523. In that case, too, the opinion of the court upon this point was a *dictum*, — but a *dictum* so forcibly expressed as to leave no doubt of the final dissent of that court from the decisions of the English courts upon this subject, and its adherence to the more liberal rules first pronounced by various state courts in different parts of the Union. Mr. Justice Miller delivered the opinion, in the course of which he said: 'But while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts, upon the extremest doctrine of the English chancery court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the

remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual, without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity, to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the states of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction. It is believed that every state in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different states. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the states. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by state laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held that as to contracts made thereafter the exemptions were valid. This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life estate, or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that in creating a debt with such person he has no right to look to that income as a means of discharging

it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such devise. Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who gives, who gives without pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived.'

"It remains for us to call attention to the American cases announcing and sustaining the rule to which the supreme court of the United States has yielded its weighty assent, as shown in the foregoing quotation. In the pioneer case upon this topic, a father directed his executors to purchase a tract of land, and to hold the same in trust for his son, and to permit the son to have the rents, issues, and profits thereof, but that the same should not be liable to any debts contracted or which might be contracted by the son, at whose death the land should vest in his heirs, but if he should die without heirs, then in the heirs of the testator. The executors purchased a tract of land, and took a conveyance to themselves, subject to the trusts specified in the will. Afterward the life estate of the son was levied upon and sold. A conveyance was made pursuant to the sale, and the purchaser sought, in an action of ejectment, to recover possession of the property. His right of recovery was denied, on the broad ground that 'a man may, undoubtedly, so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses, and defining the power of the trustees. Nor is such a provision contrary to law or any act of assembly. Creditors cannot complain because they are bound to know the foundation upon which they extend their credit': *Fisher v. Taylor*, 2 Rawle, 33. This case has been repeatedly reaffirmed: *Vaux v. Parke*, 7 Watts & S. 25; *Shunkland's Appeal*, 47 Pa. St. 113; *Overman's Appeal*, 88 Pa. St. 276; *Thackara v. Mintzer*, 100 Pa. St. 151. The principle of this case has been very frequently applied by the courts of the same state, Pennsylvania; but it appears to be essential, to bring a devise or bequest within the protection of the rule there maintained, that the testator in his will either prohibit the alienation or taking in execution of the beneficial interest: *Girard Life Ins. Co. v. Chambers*, 46 Pa. St. 485; 86 Am. Dec. 513; or vest the trustees with a mere discretion to pay or to withhold the fund or its proceeds as they may deem proper: *Keyser v. Mitchell*, 67 Pa. St. 473. A man's friends may raise a fund and place it in his control for the purpose of engaging in business, to enable him to support his family, and if he accepts such funds and makes a profit thereon, they are not subject to execution against him: *Holdship v. Patterson*, 7 Watts, 547. In Kentucky, a testator devised his estate to trustees, the greater portion to be held for the benefit of his grandchildren, but the trustees were to pay to his son Robert, during the latter's life, the sum of twenty-five dollars per month for his support. An attempt, made by creditor's bill, to reach Robert's life estate proved futile, because the court construed the trust as giving Robert no absolute, assignable interest, but merely as imposing upon the trustees the duty of using the amount designated for his support, and because the principles of equity 'do not subject the father's property to the debts of the son, nor give to the creditors of the

son any right to complain, that the father has not left or placed his property within their reach': *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56. In Connecticut, a testator devised and bequeathed his estate to his sons and daughter, but inserted in the will the following condition: 'All and every of the property given to my daughter is for the exclusive benefit of her and her children, free from the debts and control of her husband; and to secure the same to their unimpaired enjoyment, I hereby give the same to my sons, George P. Beirne and Oliver Beirne, with full authority to apply the property as to them shall seem best, for their exclusive benefit, during the life of my said daughter, and after her decease, to divide the same equally among her children.' A bill was filed in chancery to compel the payment of a promissory note executed by the daughter, out of moneys held by the sons as trustees under the will. The bill was dismissed, the majority of the court maintaining the right of a parent to place funds in the hands of trustees to be used for the benefit of a child, and not subject to alienation, whether voluntary or compulsory: *Leavitt v. Beirne*, 21 Conn. 1; *Easterly v. Keney*, 36 Conn. 18. The clause in the will here involved was as follows: 'I give and devise to my friend Henry Keney a three-fifths part of the brick house and lot next adjoining St. John's Hotel, to him and his heirs forever, in trust, however, for my nephew, Albert W. Goodwin of Wethersfield; and I do hereby order and direct said trustee to pay said Albert W., and this devise is for the purpose of securing to the said Albert W., the rents, use, and benefits of said devise, exclusive of all other persons. Said trustee is hereby directed to pay to said Albert W., or to his written order, made annually, the rents, profits, and issues of said building hereby devised, and this devise is not to inure in any manner for the use and benefit of any creditors of said Albert W., but is hereby intended to be for the only use and benefit of said Albert W., and for such use and purpose only as he shall annually appoint.' An execution was levied on the lands devised, and the levy was held inoperative. The court, however, was of the opinion that the beneficiary had a vested interest in the moneys in the hands of the trustee, and that such moneys were subject to attachment. The courts of this state have, therefore, proceeded no further than to hold that where the trustees are vested with a discretion to pay or withhold the moneys, they will not control such discretion in the interest of creditors.

"In Virginia, lands were devised to a trustee for the benefit of Henrietta F. Handley, then the wife of Alexander W. Handley, and her family. The trustee was directed so as to use and conduct the farm or plantation as to be most advantageous to the interests and support of said Henrietta F. and her children during the lifetime of said Henrietta. On a suit in equity being instituted to reach the interest of the wife and apply it to the satisfaction of her creditors, it was held that it was competent for the testatrix to provide a fund for the support of her daughter and the latter's children, and the fund not being shown to be in excess of what was needed for such support, the bill must be dismissed: *Nickell v. Handley*, 10 Gratt. 336. In the same state, one Platoff Zane, on becoming possessed by inheritance of a vast estate, contracted in a little over a year liabilities exceeding fifty thousand dollars, and his friends, foreseeing that his extravagances and business incapacity would soon reduce him and his family to want, prevailed upon him to execute a deed of trust. By this deed all his property was conveyed to trustees, with ample powers to take possession thereof, and to sell and dispose of the same, and out of the proceeds to pay all existing creditors of the grantor and the expenses of the trust. After these

debts and expenses should be paid, the residue of the property was to be employed in purchasing a residence for Zane and his wife, and in making investments in bank stocks and other good securities. The income derived from the stocks and securities was to be applied to the support of Zane and wife during their lives and the life of the survivor, and at the death of the survivor was to go to their descendants and heirs. A bill in chancery was filed by a creditor, whose debt accrued subsequently to the date of the deed, whereby he sought to assail the deed as fraudulent, and to compel the trustees to pay such debt out of the trust property. The court determined that the deed, because it provided for all the existing debts of the grantor, could not be justly regarded as fraudulent, in the absence of any actual or express fraudulent intent on the part of the grantor, and that the interest reserved by the deed to the grantor, being merely a right to support and maintenance during life, was not subject to creditor's bill: *Johnston v. Zane*, 11 Gratt. 552.

"A testator devised certain real estate upon the following trusts: 'To keep said lands and tenements well rented; to make reasonable repairs upon the same; to pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. At the death of the said Juliet, said trust estate shall cease and be determined, and the said lands shall vest in the heirs of the body of the said Juliet, and in default of such heirs, shall descend to the heirs of my body then living, according to the laws of Illinois then in force regulating descents.' After the will had been probated, and moneys had come into the hands of the trustees, to which the daughter, Juliet, was entitled, such funds were attempted to be attached by her creditors. The court conceded that upon an absolute conveyance or gift there could not be annexed conditions and limitations which would 'defeat or annul the legal consequences of the estate transferred,' but added: 'But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life; and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would, in many cases, fall far short of the object of its creation, if the father in such case has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settler is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the funds shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortunes may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers': *Steib v. Whitehead*, 111 Ill. 249. Like reasoning prevailed in *Wallace v. Campbell*, 53 Tex. 229; *White v. White*, 30 Vt. 338; *Arwine v. Carroll*, 8 N. J. Eq. 620.

"In Tennessee and New York the question has been settled by statutes, which, in substance, exclude from proceedings in equity to reach beneficial interests all cases where the trust has been created by, or the fund held in

trust has proceeded from, some person other than the debtor: *Hooberry v. Harding*, 3 Tenn. Ch. 677; *Campbell v. Foster*, 35 N. Y. 366; *Bramhill v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; with the limitation in the last-named state which enables a creditor to reach any portion of a trust fund 'beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created': *Williams v. Thorn*, 70 N. Y. 270; *Sillick v. Mason*, 2 Barb. Ch. 79; *Graff v. Bonnett*, 31 N. Y. 9, 83 Am. Dec. 236. In *Hallett v. Thompson*, 5 Paige, 583, Chancellor Walworth showed an inclination to follow the English chancery decisions, and to hold that 'an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned,' must be thwarted in a court of chancery: See also *Olute v. Bool*, 8 Paige, 82; *Degraw v. Clason*, 11 Paige, 136. It is no objection to the validity of a devise under these statutes that the beneficiary is also one of the trustees of the fund, if there are other trustees competent to act, and the income of the fund cannot be applied to the use of the beneficiary without the concurrence of the other trustees: *Wetmore v. Truelow*, 51 N. Y. 338.

"A wife devised and bequeathed her property to a trustee, to hold for the sole use and support of her husband, with power to sell or exchange the property and to reinvest the proceeds. The trustee was required to exact the written receipt or assent of the husband in every instance in which he paid moneys to him or sold or exchanged property, and was directed to convey any part of the testator's estate 'to such associations, person, or persons as her husband might designate by written authority.' The interest of the husband was adjudged to be clearly subject to a bill filed by his creditors, for the following reasons: 'No other person is named in the will as a *cestui que trust*, either during the life of the husband or after his death; no accumulation of income is provided for or contemplated; nor is any disposition made of the remainder after his death in case of his not exercising the power conferred on him; and no restrictions whatever are imposed by the will or committed to the discretion of the trustee as to the amount of principal or income that the husband may receive, or the uses to which he may apply them': *Sparhawk v. Coon*, 140 Mass. 267."

Notwithstanding the many decisions on the subject of spendthrift trusts referred to in the above quotation, the subject seems still to excite much attention, and to call for frequent consideration by the courts of last resort in the United States. A very decided majority of the most recent decisions are clearly in conformity with the rules laid down by the supreme court of the United States, as will more fully appear from the following references.

In Georgia, a husband by his will provided that certain parts of his estate should be held jointly for the benefit of his wife and children, and directed his executor to manage the same for them, and upon the happening of certain contingencies the share of his wife was to be divided from that of his children, but his executor was to continue the management of the wife's portion, as her trustee, so long as she should live, permitting her to use the income for her ease and comfort, and after her death her portion was to be divided among her children, but in no case was her share to be subject to the debts, liabilities, or contracts of her future husband. The widow became indebted and a judgment was rendered against her. On this judgment a creditor's bill was filed seeking the appointment of a receiver on whom should be conferred the power to appropriate the rents and profits of the

share of the property received by her under her husband's will to the payment of the judgment. The prayer of the bill having been granted, an appeal was taken, and the judgment thereupon reversed, because "there is no equitable reason why this debt should be paid out of the income arising from the estate of her husband, and to deprive her of this support would be to render the will of the testator nugatory": *Barnett v. Montgomery*, 79 Ga. 728.

In Maryland, real property was devised to J. R. F., in trust, to collect the rents and profits and to pay the same to the testator's son, Robert, "into his own hands, and not to another, whether claimed by his authority or otherwise," and upon the death of such son to convey the property to his children. The court of appeals of the state determined, — 1. That the testator meant to give the income of the property to his son, to the exclusion of the latter's creditors; and 2. That his intention in this respect had been accomplished, and that the creditors of the son could not by any process, either at law or in equity, reach such income before it was paid to the son: *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398. In the same state, a testatrix devised certain real property to be equally divided among her five children, "to her sons, in trust, for the support, maintenance, education, and advancement in life of their several and respective families, so that they or said sons should hold and possess said property and the rents and profits thereof, and apply the same as they might deem best, during the several lives of said sons, to and for such uses and purposes," and further declared that no part of the property should in any event be made liable for the debts and contracts of the children of the testatrix, so as to be sold for the same or in any manner diverted from the object and purpose of the trust. An execution, issued on a judgment recovered against one of the sons, was levied upon crops raised by him on part of the lands acquired by him under the will. A motion was thereupon made to quash the levy, on the ground that the defendant in execution did not have any interest subject to levy therein, and such motion was granted: *Maryland G. A. v. Lee*, 72 Md. 161.

In Massachusetts, if there is a gift of the whole income of property to another for his comfort and support: *Maynard v. Cleves*, 149 Mass. 307; or of an entire beneficial interest, both in the income of property and in the property itself, without any limitation of the power of alienation, or of the power to seize it under execution, being directly expressed, or necessarily implied from the general purposes of the bequest or gift: *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320; the estate of the beneficiary is absolute and unconditional, and may be conveyed by him or taken in execution. But it is equally true, in that state, that one having the right to dispose of property may settle it, in trust, in favor of another, in such manner that it cannot be taken by his creditors in advance of its payment to him: *Broadway N. B. v. Adams*, 133 Mass. 170; 23 Am. Rep. 504; and further, that the intention of the testator in this respect need not be stated in direct terms, if it can be fairly gathered from the instrument creating the trust, when considered in the light of attendant circumstances, and therefore that "if property is devised to one on condition that he shall support another during life, the interest of the beneficiary cannot be reached by his creditors, because if it could be so reached the intent of the testator would be necessarily thwarted by taking away from the beneficiary the provision made for his support": *Slattery v. Wason*, 151 Mass. 266; 21 Am. St. Rep. 448; *Baker v. Brown*, 146 Mass. 369.

In Missouri, a devise to a trustee for the use of the testator's sons, with

power to them to use and enjoy the rents and profits during their lives, with the express object of securing to them the annual income beyond the accident of fortune and bad management on their part, and to take away from them the power of disposing of the same or of creating any lien thereon, or of making the same liable for their debts, vests in the devisees an interest in the income of the realty, which is inalienable by them, or either of them: *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358. A devise of property, in trust, for the testator's son for life, with a direction to the trustee to pay the income semi-annually, "on his personal receipt, without said son having any power to sell, assign, or pledge the same previous to the payment thereof to him," does not vest in the son any interest which can be reached by his creditors or assignees: *Partridge v. Cavender*, 96 Mo. 452. But if the beneficiary has parted with, or is required to part with, something of value in consideration of receiving the benefit of a devise or legacy, then it cannot be made inalienable by him, nor exempted from seizure by his creditors, as where a devise or bequest in his favor is made by his wife in terms exempting it from seizure under execution, but exacting as a condition precedent that he shall relinquish his curtesy in her estate: *Bank of Commerce v. Chambers*, 96 Mo. 459.

So in Pennsylvania, there is no doubt that a testator may devise property, in trust, with directions to his trustee to pay the income to designated persons during their lives, and exempt the interest of his beneficiaries from seizure under attachment, execution, or otherwise: *Mannerback's Estate*, 133 Pa. St. 342; *Ghormley v. State*, 139 Pa. St. 584; 23 Am. St. Rep. 215; and that the intent to create such exemption need not be stated in express or direct terms, if fairly inferable from the will, construed in the light of circumstances attending its execution: *Stambaugh's Estate*, 135 Pa. St. 585; but a grantor cannot create a trust in favor of himself by which his property, or the income to be derived from it, shall be exempted from the demands of his creditors: *Ghormley v. Smith*, 139 Pa. St. 584; 23 Am. St. Rep. 215.

The supreme court of Tennessee formerly insisted that a trust of the nature we are now considering was against public policy, unless created for the benefit of a married woman, an infant, or a person of unsound mind, incapable of managing his affairs: *Turley v. Masingill*, 7 Lea, 353; *Hooberry v. Harding*, 10 Lea, 392; but upon re-examining the question, determined to overrule its earlier decisions, and to adopt both the language and the conclusions of the supreme court of the United States, found in its opinion in *Nichols v. Eaton*, 91 U. S. 716, hereinbefore quoted: *Jourdan v. Masingill*, 86 Tenn. 81.

In Vermont, a devise was made to the testatrix's executor, in trust for her brother H., "the said H. to have the use and occupation of the estate during his natural life, and at the said H's death, the said estate to be conveyed by the executor to whom and in the manner said H. may direct." H. at the making of the will was insolvent. From this insolvency and the terms of the will the court determined that it was the intention of the testatrix to vest H. with an estate or interest not subject to execution, and that such intent was lawful, and should be allowed to prevail: *Wales v. Bowditch*, 61 Vt. 23. The views of the highest court of Virginia upon this subject sufficiently appear from the opinion in the principal case.

In Kentucky, the statutes declare: "Estates of every kind held or possessed in trust shall be subject to the debts and charges of the person to whose use and for whose benefit they shall be respectively held or possessed as they would be subject if those persons owned the like interest in the property held or possessed as they own, or shall own, in the use or trust

thereof." The courts of that state interpret this provision as forbidding the creation of spendthrift trusts, and demanding that any estate or interest to which a beneficiary is entitled under the provisions of a will or otherwise shall, at the instance of his creditors, be applied to the extinguishment of their debts, and the only mode of averting this result is to provide that upon the happening of some contingency, such as the seizure or attempt to seize the property by execution, the estate of the beneficiary shall terminate and become vested in some other person: *Rudd v. Hagan*, 86 Ky. 159; *Marshall's Trustees v. Rash*, 87 Ky. 116; 12 Am. St. Rep. 467; *Bull v Kentucky N. B.* (September, 1890); *Bland's Adm'r v. Bland* (September 1890).

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

GREAT WESTERN TELEGRAPH CO. v. BURNHAM.

[79 WISCONSIN, 47.]

CORPORATIONS. — ANY CALL OR ASSESSMENT WHICH REQUIRES SOME OF THE STOCKHOLDERS OF A CORPORATION TO PAY A HIGHER RATE THAN OTHERS will not be enforced. A call must be made on all alike, or it will be void. Hence if a complaint in an action to recover an assessment shows that some of the stockholders have paid forty per cent of their subscriptions, while others have paid but two per cent, and that a further assessment of thirty-five per cent has been levied upon all stockholders, a demurrer to the complaint must be sustained, on the ground that it appears therefrom that the assessment was unequal, partial, and invalid.

CORPORATIONS. — UNEQUAL ASSESSMENT AGAINST A STOCKHOLDER OF A CORPORATION, THOUGH MADE BY A COURT OF ANOTHER STATE, cannot be enforced by action in this state against a stockholder who was not a party to the proceeding in the other state.

Quarles, Spence, and Quarles, for the appellants.

Shepard and Shepard, and T. J. Sutherland, for the respondent.

COLE, C. J. This action was brought against George Burnham in his lifetime, and after his death was revived against the executors of his will. The action is upon a contract of subscription to the capital stock of the plaintiff corporation. It appears from the complaint that Burnham, in May, 1869, subscribed for and agreed to take one hundred shares of the capital stock, and pay for the same as follows: five per cent of the par value down, and the balance of the par value, to wit, twenty-five dollars upon each share so subscribed for, from time to time, as the directors of the corporation should

order. Burnham has paid forty per cent, or ten dollars, on each share subscribed for, leaving sixty per cent, or fifteen dollars, on each share unpaid. The complaint alleges that a large number of other persons besides Burnham also subscribed for the capital stock, to the extent and amount of all the shares into which the capital stock was divided, upon agreements similar in all respects to Burnham's agreement. It is further stated in the complaint that in November, 1869, a suit was commenced in the circuit court of Cook County, Illinois, wherein one Terwilliger, a stockholder, was plaintiff, in behalf of himself and other stockholders similarly situated, against the plaintiff corporation and other defendants, which suit is still pending and undetermined. The corporation appeared in that action, and submitted to the jurisdiction of the court. In the proceedings therein taken, the court, among other things, took control of the powers and property of the corporation, appointed a receiver, with the usual powers of a receiver, to take charge of the affairs of the corporation, manage its business, collect the assets, and pay the debts of the corporation. It is alleged that in July, 1886, the corporation was justly indebted to sundry persons in a large amount, namely, in the sum of four hundred thousand dollars, the whole of which indebtedness accrued against the company after Burnham entered into his contract of subscription, and that the corporation has no property, except the amounts unpaid upon the shares of the capital stock, to pay or meet this indebtedness; that the unpaid shares are largely in excess of said indebtedness. And it is further alleged that, before said last-named date, a small number of its stockholders had paid to the plaintiff twenty-five dollars on each of its shares of stock subscribed for by them respectively, being the par value, and in full of the same; that none of the remainder of said stockholders and subscribers had before said last-named date, nor have any of them now, paid more than ten dollars upon each of the shares of the capital stock severally subscribed for or held by them; that many of them have never paid more than fifty cents upon each of such shares severally subscribed for by them, and there was, on said last-named date, a balance and amount unpaid upon each of the shares of the capital stock (except those which had been paid for in full, as aforesaid), including those subscribed for by the defendant Burnham, of not less than fifteen dollars, which the stockholders are severally liable to pay, when called upon

and ordered to pay according to the terms of their several agreements of subscription; and that the stockholders have been ordered to contribute thirty-five per cent of the par value of the shares of stock subscribed for, to be used and applied to the payment of the indebtedness of the corporation, and of the expenses of the receiver incurred in and about its affairs.

The corporation brings this suit to recover this thirty-five-per-cent assessment or call upon the stock purchased by Mr. Burnham. A number of objections were taken by way of demurrer to the complaint in the circuit court, which were ably discussed on the oral argument at this bar. From the view which we have taken of the complaint, we do not deem it necessary to consider all these points. We shall assume, for the purposes of this appeal, without deciding other points, that the action may be prosecuted in the name of the corporation, even after the appointment of a receiver, and ordering him to take charge and control of its property, collect its assets, and pay its debts. We will further assume that the Illinois court of equity in the suit before it, having also before it all the evidence as to the organization of the corporation, the validity of the stock subscriptions, and the liabilities of the corporation, could decree or make a call on the unpaid subscriptions to the stock in the same manner and with like effect as though the directors of the corporation themselves had ordered the assessment, as they were authorized to do by the contract of subscription. But we fully agree with the appellants' counsel that any call or assessment made upon the shares must be uniform, and in ratable amounts, and that any call or assessment which requires some share-holders to pay a higher rate than other share-holders is unjust, and should not be enforced. We have referred to the averment of the complaint which states that some of the stockholders have paid ten dollars, or forty per cent, on each share of stock held by them, while many of the stockholders have never paid more than fifty cents, or two per cent, on a share. It requires no argument to show that such a call or assessment on the stock is grossly unequal and unjust. We think Mr. Morawetz states the correct rule on this subject in the following language: "Justice between the share-holders of a corporation requires that all the share-holders should contribute in respect to their shares at the same time, and in ratable amounts. A call requiring some share-holders to pay in more

than others would therefore be invalid. But if some shareholders have already contributed more than others, it would be not only the right but the duty of the directors to make calls upon the other share-holders in such amounts as to equalize the contributions of all": Morawetz on Private Corporations, 2d ed., sec. 154. See also *Pike v. Banger etc. R. R. Co.*, 68 Me. 445. Cook on Stocks and Stockholders, 2d ed., sec. 114, says: "A call . . . must be made on all alike, or it will be void. The courts will not allow the directors of a company so to proceed as to require some stockholders to pay calls, and not to require others to do the same." And this accords with common sense, and all notions of equity and fairness.

It is also objected that the assessments exceeded in amount what was needed for the payment of the debts of the corporation and the legitimate expenses of administering its affairs. We shall not go into that question at this time. Presumably, the court examined into the financial condition of the corporation, and determined what amount of money it was necessary to raise to meet its liabilities. But neither the court nor the directors were authorized to make an assessment so unequal and partial as the complaint shows was made in this case; and the very intelligent counsel for the plaintiff did not claim that a partial and unequal assessment was valid, but he insisted that we must presume that the assessment was equal and fair; that the stockholders who had paid but two per cent on their shares had paid other assessments so as to equalize all the calls, and make them forty per cent. We do not see how such a presumption can be made in view of the averments in the complaint, for it is distinctly alleged that some of the stockholders have paid forty per cent of the par value of their shares, while many others have paid only fifty cents on each share,—in other words, have paid but two per cent on the par value of the shares. With such a state of facts, how a horizontal assessment of thirty-five per cent on all the shares can be said to be uniform and just passes our comprehension. It is certainly no "forced inference" from the complaint that the assessment alleged to have been made is illegal, and does not furnish a proper basis for this action. Nor can the fact that the call or assessment was made by the court in the suit before it change our conclusions as to its inequality and unfairness. A court by its decree cannot make that which is essentially wrong and unjust right and

and ordered to pay according to the terms of their several agreements of subscription; and that the stockholders have been ordered to contribute thirty-five per cent of the par value of the shares of stock subscribed for, to be used and applied to the payment of the indebtedness of the corporation, and of the expenses of the receiver incurred in and about its affairs.

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than others would therefore be invalid. But if some shareholders have already contributed more than others, it would be not only the right but the duty of the directors to make calls upon the other share-holders in such amounts as to equalize the contributions of all": Morawetz on Private Corporations, 2d ed., sec. 154. See also *Pike v. Bangor etc. R. R. Co.*, 68 Me. 445. Cook on Stocks and Stockholders, 2d ed., sec. 114, says: "A call . . . must be made on all alike, or it will be void. The courts will not allow the directors of a company so to proceed as to require some stockholders to pay calls, and not to require others to do the same." And this accords with common sense, and all notions of equity and fairness.

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just. But it is said we must give full faith and credit to the proceedings of the Illinois court, and that we should not presume it would make an unfair and unequal assessment. But we must take the allegations of the complaint as we find them, and give them their obvious sense and meaning; and when it is stated that some of the share-holders have paid forty per cent of their subscriptions, while others have paid but two per cent, and then proceeds to claim that a horizontal assessment of thirty-five per cent is made on all share-holders alike, we think it fairly appears that an unequal and unjust assessment was made. We do not intend to express any definitive opinion as to the real effect of the decree of the Illinois court, or as to how far it concludes the rights of share-holders who were not parties to that proceeding. Those questions are not now necessarily before us, and may be postponed until they arise. We confine our decision to the objection that the complaint shows an unlawful and illegal call or assessment upon Mr. Burnham, which should not be enforced. The demurrer to the complaint was well taken, and should have been sustained.

The COURT. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

CORPORATIONS — CALLS AND ASSESSMENTS. — An assessment which is not made on all the shares alike is invalid, and creates no liability: *Pike v. Bangor etc. R. R. Co.*, 68 Me. 445. It is a question whether a mutual insurance company can prescribe different rates of contribution founded only on the magnitude of the premium notes: *Bangs v. Duckinfield*, 18 N. Y. 592. As to the general liability of stockholders on calls and the tests of the validity of the same, see extended note to *Thompson v. Reno etc. Bank*, 3 Am. St. Rep. 806.

O'MALLEY v. RUDDY.

[79 WISCONSIN, 147.]

MORTGAGE OF A HOMESTEAD IS NOT VALID UNLESS SIGNED BY BOTH HUSBAND AND WIFE; and her answer in a suit to foreclose a mortgage, admitting it to be valid and consenting to its foreclosure, is not equivalent to her signing it.

MARRIED WOMAN'S SIGNATURE TO A NOTE DOES NOT CREATE ANY INDEBTEDNESS AGAINST HER unless she had a separate estate or business.

MORTGAGE WILL NOT BE REFORMED SO AS TO INCLUDE THE HOMESTEAD OF THE MORTGAGORS, though such homestead was intended to be embraced in it, if the statute of the state declares that no mortgage of a homestead by a married man shall be valid or of any effect without the

signature of his wife to the same, though before suit was brought the husband had died, and the widow by her answer assented to such reformation.

Bashford, O'Connor, and Polleys, for the appellant.

H. W. Chynoweth, for the respondent.

LYON, J. The proposition maintained by counsel for plaintiff, and which covers the whole case, is, that "in order to carry out the original intention of the parties, the error of description in the mortgage may be corrected so as to embrace the homestead, the husband being dead and the widow consenting thereto, especially as the consideration for the mortgage was the joint indebtedness of the husband and wife."

The above proposition contains two statements or assumptions of fact which require consideration. One is, that the widow of Austin Ruddy consents to such reformation. It is true that she does so in her answer, but this is not an effectual consent. Section 2203 of the Revised Statutes provides that "no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signature of his wife to the same." Hence no valid conveyance of his homestead can be made by a husband unless his wife signs the same. The widow of Austin Ruddy has not signed any such conveyance, and her answer admitting that the mortgage in suit ought to be reformed to include the homestead is not equivalent to such signing. Of course, she may now lawfully convey to the plaintiff, or any other person, her interest in the homestead; but such a conveyance would not affect the rights of the children and heirs of Austin Ruddy, to whom the reversionary interest therein has descended.

The other fact assumed in the above prescription is, that the mortgage was given to secure the joint indebtedness of the husband and wife. The proofs do not sustain this assumption. True, Mrs. Ruddy signed the note, to secure which the mortgage was given, with her husband, but the note was for money and supplies furnished to be used, and which were used, for the support and maintenance of Austin Ruddy and his family. Such support and maintenance was a legal charge against Austin Ruddy alone, and his wife could not bind herself to pay therefor, unless she had a separate estate or business. There is no proof or claim that she had either. She was therefore under the common-law dis-

ability of coverture, and hence her signature to the note did not create an indebtedness against her. The cases determined by this court in which it is so held are quite numerous, and entirely uniform. Some of them are cited in the opinion by Mr. Justice Cassoday in *Krouskop v. Shonts*, 51 Wis. 204; 37 Am. Rep. 817. In all the cases in this court cited by counsel to maintain the opposite doctrine the wife had a separate estate or business. It must be held that the mortgage debt was the debt of Austin Ruddy alone.

The admission of the widow that the plaintiff is entitled to the relief demanded, and the claim that she is liable for the mortgage debt, being thus eliminated from the case, the question for determination is, Can the mortgage be reformed to include the homestead, as the parties to it intended it should, the same having been the homestead of Austin Ruddy when the mortgage was executed, and continuously remaining such until he died, and having been the homestead of his widow ever since? On the authority of *Petesck v. Hambach*, 48 Wis. 443, which is like this case in every essential particular, this question must be answered in the negative. There, as here, an attempt was made by husband and wife to mortgage their homestead, but by mistake the homestead lot was not included in the mortgage. The husband afterwards died, and his widow succeeded to his estate, including such homestead, as heir or devisee. The lot remained the homestead of the parties until the husband's death, and of the wife from that time until the date of judgment. The fact last stated does not clearly appear in the report of the case, but the record shows that the circuit court so found, and the accuracy of the finding was unchallenged. The relief demanded was the same as that demanded here. The circuit court refused to reform the mortgage, and this court, on appeal, affirmed the ruling. We seldom find two cases entirely independent of each other so essentially alike in their facts.

It is quite true that the decision in *Petesck v. Hambach*, 48 Wis. 413, was by an equally divided court, but until overruled it is authority in this court: See *Lathrop v. Knapp*, 37 Wis. 307. The court has not yet overruled and is not now prepared to overrule it. To do so at this late day might divest or disturb property rights acquired on the faith of it. It should be left to the legislature to enact a different rule, if it is deemed desirable to change the rule.

Conrad v. Schwamb, 58 Wis. 372, is not in conflict with

Petesch v. Hambach, 48 Wis. 413. In *Conrad v. Schwamb*, 53 Wis. 372, the mistake occurred in a deed which was intended to convey a homestead, but which failed to do so. The purchaser went into possession of the homestead under the deed, and the grantors and their family removed to Minnesota, where the husband died eight years later. The widow and family continued to reside in that state. The propositions decided in that case are accurately stated in a head-note as follows: "A deed executed by husband and wife, which, though otherwise complete, fails through a misdescription to convey the land intended, being the grantors' homestead, must be treated as an executory contract by the husband to convey, which equity will enforce, after the homestead right ceases against the husband (or against his heirs after his death intestate), though not against his widow." The controlling difference between these two cases is, that in one of them the homestead intended to be mortgaged remained a homestead from the execution of the mortgage until the trial, while in the other the premises permanently ceased to be a homestead on the execution of the deed. Because the homestead character continued in the one case, as it does in this case, reformation of the mortgage was denied, and because it had terminated in the other case the deed was reformed as to the heirs. It is manifest that there is no conflict in the cases.

For the reasons above suggested, the circuit court properly refused to reform the mortgage, and the judgment must be affirmed.

The Court. Judgment affirmed.

HOMESTEAD — MORTGAGE — HUSBAND AND WIFE. — To release, convey, or waive homestead rights, the requirements of the statute must be strictly complied with: *Gage v. Wheeler*, 129 Ill. 197; *Lubbock v. McMann*, 82 Cal. 226; 18 Am. St. Rep. 108; *Jones v. Roper*, 86 Ala. 210; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66. A mortgage, therefore, of a homestead executed by a married man, without the proper concurrence, signature, and acknowledgment of his wife, is invalid: *McCreery v. Schaffer*, 26 Neb. 173; *Rubelman v. Rummel*, 72 Iowa, 40; *Gleason v. Spray*, 81 Cal. 217; 15 Am. St. Rep. 47, and note; *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681; note to *Witherington v. Mason*, 11 Am. St. Rep. 45; note to *Moran v. Clark*, 8 Am. St. Rep. 87, 88; *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Duncan v. Moore*, 67 Miss. 136. In Kansas the joint consent of the husband and wife need not be expressed in writing, to effect a valid alienation of their homestead: *Dudley v. Shaw*, 44 Kan. 683.

HOMESTEAD — HUSBAND AND WIFE. — As to whether a mortgage of a homestead executed by one spouse may become operative on subsequent abandonment, or on the property becoming vested solely in the spouse who

made the conveyance, see *Alt v. Banholser*, 39 Minn. 511; 12 Am. St. Rep. 681, and extended note 683-686; *Drake v. Painter*, 77 Iowa, 731.

HUSBAND AND WIFE — HOMESTEAD — REFORMATION. — Equity will correct a description in a deed made by mutual mistake, and executed by a husband and wife, conveying part of their homestead, when otherwise the conveyance was sufficient to pass the wife's interest: *Parker v. Parker*, 88 Ala. 362; 16 Am. St. Rep. 52; *Parker v. Parker*, 88 Ala. 365. A court of equity will not, however, reform a deed by a widow of all her homestead estate so as to convey merely her life interest therein, in the absence of clear proof that such was the intent of both parties: *Frederick v. Henderson*, 94 Mo. 98.

LEGO v. MEDLEY.

[79 WISCONSIN, 211.]

FORECLOSURE OF MORTGAGE, ADVERSE CLAIMS OF TITLE. — One who is made a party defendant to a suit to foreclose a mortgage, under an allegation that he claims some interest in or lien upon the mortgaged premises, may, by his answer, set up a paramount claim to such premises, and such claim may be tried and determined in that suit. The only way in which the plaintiff can avoid the trial of the claim is by discontinuing his action as to such defendant.

DEED. — PAROL EVIDENCE IS ADMISSIBLE TO SHOW THE BOUNDARIES OF A TRACT OF LAND which has been excepted by the grantor from his deed, by the description, "one acre from the southwest corner of the southwest quarter of the southwest quarter of section 9, together with the buildings thereon"; and if it appears from such evidence that the grantor was, at the time of executing the deed, and ever thereafter, in possession of a dwelling and out-buildings, and a tract of land sixteen rods long from east to west, and ten rods wide from north to south, on which such buildings were situated, and that an acre cannot be laid off at such southwest corner which will include all such buildings without being of the dimensions named, and without excluding the whole of a highway running along the south side of the lands described in the exception, then such exception must not be considered as calling for a tract in a square form, but as embracing such parallelogram, and excluding all of such highway.

DEED, HOW SHOULD BE CONSTRUED. — The construction of a grant must be favorable, and as near the meaning and intention of the parties as the rules of law will admit, and to ascertain this intention, parol evidence may be resorted to, not to contradict or vary the words of the grant, but to show, from the situation and conditions of the subject-matter, what meaning the parties attached to the words used, especially in matters of description.

LANDS, DESCRIPTION OF. — If a GIVEN QUANTITY OF LAND IS EXCEPTED OUT OF A CORNER OF A TRACT, it must be generally laid off in a square form; but parol evidence is admissible to show that such was not the intention of the parties, and their intention, when shown, must be respected, and the tract laid off accordingly.

Jenkins and Jenkins, for the appellant.

Arthur Gough, for the respondent.

TAYLOR, J. The questions arising in this case grow out of a foreclosure action brought by the plaintiff and appellant against the respondent and the other persons named to foreclose a mortgage. The mortgage sought to be foreclosed was given to the appellant by Richard P. Medley, dated October 16, 1888, to secure the payment of five hundred dollars and the interest thereon. The property mortgaged was described in the mortgage as the west half of the southwest quarter of section 9, township 30 north, of range 6 west, in Chippewa County, Wisconsin. None of the defendants in the action appeared in the case or defended the action, except the respondent, Rose Medley. She answered that she was the mother of the mortgagor, Richard P. Medley, and that on the ninth day of April, 1884, she was the owner in fee-simple of the west half of the southwest quarter of said section 9, the property described in said mortgage, and that on said ninth day of April, 1884, for love and affection for her said son, she conveyed to him, by an ordinary warranty deed, so much of said west half of said section 9 as is described in said deed, and no more. The following is the description contained in said deed from her to her said son, viz.: "The west half of the southwest quarter of section nine (9), township thirty (30), range six (6), except one acre from the southeast corner of the southwest quarter of the southwest quarter of said section, town, and range, together with the buildings thereon."

This deed was duly recorded in the proper register's office on the 10th of April, 1884. She also set forth in her answer that at the time of and ever since the execution of said deed to her said son she was, and since has been, in the actual possession of said acre of land, and the buildings thereon, and is still in possession of the same; and she further alleges in her complaint that the acre of land with the buildings thereon excepted in her said deed, and which she has always occupied and still occupies, is bounded as follows: "Beginning at the boundary line of the highway which runs along the south side of said southwest quarter of the southwest quarter of section nine (9) aforesaid, on the line of division between the southwest quarter of the southwest quarter and the southeast quarter of southwest quarter of section nine (9) aforesaid; thence west along the boundary line of said highway seventeen rods and three quarters; thence north, at right angles to the boundary line of said highway, nine rods; thence east to the boundary line between the south-

west quarter of the southwest quarter and the southeast quarter of the southwest quarter of section nine (9) aforesaid, seventeen rods and three quarters; thence south, along the boundary line between the southwest quarter of the southwest quarter and the southeast quarter of the southwest quarter of section nine (9) aforesaid, to the place of beginning; that said acre of land so measured belongs to this defendant, and that she is the owner thereof and in the actual possession of same, and has been at all times since the making of said deed to the defendant Richard P. Medley, and of the dwelling-house and buildings situated thereon, and was in such possession at the time of making of the mortgage of the plaintiff herein, and that the said Richard P. Medley had no right or title in or to said land or buildings, and no power or authority to sell or mortgage same; that the plaintiff in this action has no right or power or permission to sell or convey said land and premises, or to exercise any rights of ownership in or to same." There was no demurrer to the answer.

On the trial the plaintiff offered in evidence his note and mortgage, and made the computations of the amount due thereon, and, in addition to such evidence, he did in open court "release all claims whatever to one acre from the southeast corner of the southwest quarter of the southwest quarter of section nine (9), town thirty (30), range six (6), in Chippewa County, Wisconsin, and the buildings thereon, and consents that whatever judgment is rendered in the actions shall so declare," and rested his case; and thereupon Rose Medley was called as a witness in her own behalf. The plaintiff then objected to any evidence under the answer of defendant Rose Medley, upon the ground that the same does not constitute any defense whatever. And the counsel for the plaintiff then said: "I want to say that, meaning to release one acre in the corner square and bounded by four equal sides." The court overruled the objection to the evidence offered, and the defendant gave her testimony in the action. The court, under objections on the part of the plaintiff, permitted the defendant to show that one acre in the southeast corner of the eighty acres described in her deed to her son, in the form of a square with four equal sides, would not include her dwelling-house.

After hearing the evidence, the court made the following findings of facts and conclusions of law: The first, second and

third findings relate to the mortgage, and the amount due thereon. The court then makes the following findings: —

"4. That the said defendant Richard P. Medley derived his title to the mortgaged premises from defendant Rose Medley, under a deed executed by said Rose Medley several years prior to the execution of said mortgage, and also recorded in the office of the register of deeds, Chippewa County, Wisconsin, prior to the execution of said mortgage; that in said conveyance said lands are described as follows: 'The west half of the southwest quarter of section nine (9), town thirty (30), range six (6), except one acre from the southeast corner of the southwest quarter of the southwest quarter of said section, town, and range, together with the buildings thereon'; that at the time of the making of said conveyance there was a dwelling-house, and some out-buildings used in connection therewith, located near the southeast corner, and the said Rose Medley was in the actual possession of said tract of land, and residing in said dwelling-house; that during all the time after the making of said conveyance, up to the present, said Rose Medley has continued to reside in said dwelling-house, and used said out-buildings in connection therewith; 5. That at the time of making of said conveyance to Richard P. Medley there was, and ever since has been, a strip of land two rods wide off from the south side of said described land, constituting part of the public highway, and that said land, as used and occupied by said Rose Medley, was bounded on the south side by said highway; 6. That a square acre laid off from the southeast corner of said land would not include the said dwelling-house; and that an oblong square acre laid off from said corner, having for its southern boundary the center of said highway, would include said dwelling-house, but would not include all the other buildings referred to as used in connection therewith; but an acre so laid off from said corner, excluding the highway, that is, taking for the corner the point where the east boundary of said land intersects with the highway, would include all of said buildings; said acre would be sixteen rods long on the south boundary, and ten rods wide on the east boundary."

And as conclusions of law the court finds as follows: —

"1. That said conveyance from Rose Medley to Richard P. Medley should be construed with reference to the circumstances attending the transaction, the situation of the parties, state of the property, the location of said dwelling-house, and

west quarter of the southwest quarter and the southeast quarter of the southwest quarter of section nine (9) aforesaid, seventeen rods and three quarters; thence south, along the boundary line between the southwest quarter of the southwest quarter and the southeast quarter of the southwest quarter of section nine (9) aforesaid, to the place of beginning; that said acre of land so measured belongs to this defendant, and that she is the owner thereof and in the actual possession of same, and has been at all times since the making of said deed to the defendant Richard P. Medley, and of the dwelling-house and buildings situated thereon, and was in such possession at the time of making of the mortgage of the plaintiff herein, and that the said Richard P. Medley had no right or title in or to said land or buildings, and no power or authority to sell or mortgage same; that the plaintiff in this action has no right or power or permission to sell or convey said land and premises, or to exercise any rights of ownership in or to same." There was no demurrer to the answer.

On the trial the plaintiff offered in evidence his note and mortgage, and made the computations of the amount due thereon, and, in addition to such evidence, he did in open court "release all claims whatever to one acre from the southeast corner of the southwest quarter of the southwest quarter of section nine (9), town thirty (30), range six (6), in Chippewa County, Wisconsin, and the buildings thereon, and consents that whatever judgment is rendered in the actions shall so declare," and rested his case; and thereupon Rose Medley was called as a witness in her own behalf. The plaintiff then objected to any evidence under the answer of defendant Rose Medley, upon the ground that the same does not constitute any defense whatever. And the counsel for the plaintiff then said: "I want to say that, meaning to release one acre in the corner square and bounded by four equal sides." The court overruled the objection to the evidence offered, and the defendant gave her testimony in the action. The court, under objections on the part of the plaintiff, permitted the defendant to show that one acre in the southeast corner of the eighty acres described in her deed to her son, in the form of a square with four equal sides, would not include her dwelling-house.

After hearing the evidence, the court made the following findings of facts and conclusions of law: The first, second and

third findings relate to the mortgage, and the amount due thereon. The court then makes the following findings: —

“4. That the said defendant Richard P. Medley derived his title to the mortgaged premises from defendant Rose Medley, under a deed executed by said Rose Medley several years prior to the execution of said mortgage, and also recorded in the office of the register of deeds, Chippewa County, Wisconsin, prior to the execution of said mortgage; that in said conveyance said lands are described as follows: ‘The west half of the southwest quarter of section nine (9), town thirty (30), range six (6), except one acre from the southeast corner of the southwest quarter of the southwest quarter of said section, town, and range, together with the buildings thereon’; that at the time of the making of said conveyance there was a dwelling-house, and some out-buildings used in connection therewith, located near the southeast corner, and the said Rose Medley was in the actual possession of said tract of land, and residing in said dwelling-house; that during all the time after the making of said conveyance, up to the present, said Rose Medley has continued to reside in said dwelling-house, and used said out-buildings in connection therewith; 5. That at the time of making of said conveyance to Richard P. Medley there was, and ever since has been, a strip of land two rods wide off from the south side of said described land, constituting part of the public highway, and that said land, as used and occupied by said Rose Medley, was bounded on the south side by said highway; 6. That a square acre laid off from the southeast corner of said land would not include the said dwelling-house; and that an oblong square acre laid off from said corner, having for its southern boundary the center of said highway, would include said dwelling-house, but would not include all the other buildings referred to as used in connection therewith; but an acre so laid off from said corner, excluding the highway, that is, taking for the corner the point where the east boundary of said land intersects with the highway, would include all of said buildings; said acre would be sixteen rods long on the south boundary, and ten rods wide on the east boundary.”

And as conclusions of law the court finds as follows: —

“1. That said conveyance from Rose Medley to Richard P. Medley should be construed with reference to the circumstances attending the transaction, the situation of the parties, state of the property, the location of said dwelling-house, and

other buildings, and the existence of the highway; and having regard for these circumstances, the court holds that it was the evident intention of the parties, by the language used in said conveyance, that the acre excepted should be laid off from the southeast corner of said west half of the southwest quarter in said section nine (9), excluding the highway, so as to include said dwelling-house and said out-buildings used in connection therewith as the same were located at the time of the execution of said conveyance, which said acre, as near as can be determined from the testimony, is bounded as follows: Beginning at a point where the east boundary line of the southwest quarter of the southwest quarter of section nine (9), town thirty (30), range six (6), intersects with the highway on the south side of said land; thence west along the said highway sixteen rods; thence, at right angles, north ten rods, to the said east boundary line of said land; thence, at right angles, south to the place of beginning; 2. That plaintiff is entitled to judgment as prayed for in the complaint, except that said judgment should provide only for a sale of the west half of the southwest quarter of said section nine (9), excepting one acre from the southeast corner thereof, described as aforesaid."

The plaintiff excepted to the conclusions of law, but took no exceptions to the findings of fact. The learned counsel for the appellant assigns two errors: 1. That it was error to permit the defendant Rose Medley to introduce any evidence under her answer, on the ground that it does not state facts constituting a defense to the plaintiff's action, or to any part thereof; 2. That the court erred in permitting parol evidence to aid in construing the deed given by the said defendant to her son. He also assigns as error the allowance of costs to the respondent.

The first objection, that the answer does not constitute a defense to the plaintiff's action, or any part thereof, cannot be sustained under the rule established by this court in *Wicks v. Lake*, 25 Wis. 71; *Roche v. Knight*, 21 Wis. 824; *Newton v. Marshall*, 62 Wis. 8, 17. These cases hold that when the plaintiff in a foreclosure action makes any person defendant, alleging "that he claims to have some interest or lien upon the mortgaged premises, or some part thereof, which lien, if any, has accrued subsequently to the time of said mortgage," such defendant may by his answer set up a paramount claim to the mortgaged premises, or to some

part thereof, and that such right may be tried and adjudged in the foreclosure action. This rule is certainly the correct rule, and the only way the plaintiff can avoid the trial of the right of the defendant so brought into court by him, as to his paramount title, is to discontinue his case as to such defendant so that he may not be prejudiced by the judgment to be entered in the foreclosure action: See *Hekla F. Ins. Co. v. Morrison*, 56 Wis. 133, 136. As the plaintiff did not offer to discontinue his action as to the respondent after she had filed her answer setting up her paramount title, he cannot now object to the trial of her right. He in fact admitted her right, and offered to take judgment recognizing her right to the acre excepted in her deed, but insisted that the excepted acre should be in the form of a square. He therefore waived his objection to her asserting a right paramount to his mortgage, and insisted in binding her to take the excepted acre in the shape which he claimed was given to her by the law under her deed.

The learned counsel also insist that the court erred in permitting respondent to introduce parol evidence of the situation of her buildings in the southeast corner of said west half of the southwest quarter mentioned in her deed to her son, for the purpose of locating the acre of land so excepted from her deed; the claim being that the exception in the deed is the exception of an acre in the southeast corner in the form of a square, and that parol evidence is inadmissible to show that any other form was intended by the parties. The rule contended for by the learned counsel is undoubtedly the correct rule, when there is nothing else in the deed which calls for a different form. But the rule does not apply to a case when the exception is of a certain quantity of land, and the exception from the tract described in the conveyance refers to other objects than mere locality. It is not denied by the learned counsel that if the exception had been of one acre in the southeast corner of the tract conveyed, including the grantor's dwelling-house situated thereon, that evidence would not be admissible to show that one acre in a square form would not cover the dwelling-house, and that in such case the bounds of the acre should be so located as to include the dwelling-house, if this could be done, and still locate the acre on the southeast corner of the tract conveyed. The surroundings and the objects on the ground would control the shape of the acre, which, in the absence of such surround-

ings and objects called for in the deed, the law would construe to mean a square acre. In such case there is no mistake in the description, which, if corrected at all, must be corrected in an action brought for that purpose. It is a mere question of the location of the tract excepted in the conveyance.

But the learned counsel insists that an acre in a square form will cover all the material calls for boundary mentioned in the deed, because the evidence shows that an acre in a square form will include some of the buildings of the defendant situate in the southeast corner of the land described in the deed. That fact we do not think meets the call for the buildings evidently intended by the parties to the deed. Such acre would not include the defendant's dwelling-house, which was evidently far the most valuable building situate on the southeast corner of the land described in the deed; and that fact, with the other evidence introduced, raises a fair presumption that that building, of all others, was the one intended by the parties as one of the buildings which they intended the excepted acre should include.

It is true that the description of the excepted acre in the conveyance from the mother to the son is not as particular and specific as it should have been, but under the evidence showing that at the time the conveyance was made the grantor owned an adjoining eighty acres, and that her dwelling-house and outhouses were situate on the eighty acres conveyed to her son, that these houses constituted her home at the time, and that after the execution of the deed she remained in the occupation of her dwelling and outhouses as she had done before, claiming to own the same, strongly tend to show that such dwelling-house and other buildings were situate on the acre excepted in the conveyance to her son; and as an acre of land can be laid off in the southeast corner of the tract described in the conveyance in a convenient and useful form, so as to include the buildings, it seems to us that the court properly directed that it should be so laid off and bounded. The words in the description are general, and not specific, and, in the absence of anything indicating a different boundary, the law would determine that the acre should be a square; but when there is anything in the description which would not be complied with by making the acre a square, then the question as to what was intended by the parties by the words used is to be determined by the surrounding cir-

circumstances. In such case there is a latent ambiguity on the face of the deed when applied to the facts existing at the time the conveyance was executed, and the intent of the parties in such case becomes a question of fact, and not one of law, to be determined alone by the mere words used in the conveyance.

The rule applicable to this case is well stated in *Dunn v. English*, 23 N. J. L. 126, 128. In that case the court say: "The construction of the grant must be favorable, and as near the mind and intention of the parties as the rules of law will admit, and to ascertain this intention parol evidence may be resorted to, not to contradict or vary the words of the grant, but to show from the situation and condition of the subject-matter what meaning the parties attached to the words used, especially in matters of description." The rule above stated was recognized and approved by this court in the opinion of the late learned Chief Justice Ryan in the case of *Lyman v. Babcock*, 40 Wis. 512. See also *Ganson v. Madigan*, 15 Wis. 144; 82 Am. Dec. 659; *Prentiss v. Brewer*, 17 Wis. 635; 86 Am. Dec. 730; *Rockwell v. Mutual L. Ins. Co.*, 21 Wis. 548; *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503. This rule is peculiarly applicable to the case at bar. The parol evidence was offered to show what the intention of the parties was as to the land excepted from the deed from the mother to the son. It does not contradict the language used in the deed, but tends to explain its meaning as intended by the parties at the time. The fact that the respondent lived, at the time the conveyance to her son was made, in the southeast corner of the eighty acres described in the deed, that she had no other home, and owned a farm adjoining, explains what was intended by the use of the words in the deed, "together with the buildings thereon," and it overcomes the general presumption that, without any explanation, an acre in the southeast corner of the land conveyed must be construed to mean a square acre. We think there was no error in permitting the introduction of the parol evidence allowed on the trial.

The objection that the court erred in allowing costs to the respondent cannot be sustained. The allowance or disallowance of costs to parties in an equitable action is generally in the discretion of the court: See the last paragraph of subd. 7, sec. 2918, Sanborn and Berryman's Ann. Stats.

We think there was no abuse of discretion on the part of the court in allowing costs to the defendant in this case.

The plaintiff had notice of the respondent's claim to the land the court awarded her, before and at the time he brought his action. Her deed was on record, and she was in the actual possession of the land claimed, and had been so in possession from the date of her deed down to the trial of the action. The plaintiff not only compelled the respondent to make good her claim under her deed, but he also contended that, by reason of certain admissions and statements he claimed had been made by her, she was estopped from setting up a claim to the land awarded to her by the court. There seems to be no good reason for holding that she was not entitled to recover costs in the action.

The COURT. The judgment of the circuit court is affirmed.

MORTGAGES — FORECLOSURE — PARTIES. — Title cannot be tried in foreclosure proceedings. There is no privity between an adverse claimant and the mortgagee, and consequently the former cannot be made a party to the foreclosure suit for the purpose of litigating his title: *Note to King v. Mason*, 89 Am. Dec. 434, 435; *Banning v. Bradford*, 21 Minn. 308; 18 Am. Rep. 398; *Hambrick v. Russell*, 86 Ala. 199; *Dickerson v. Uhl*, 71 Mich. 398; *Rogter v. Reid*, 121 N. Y. 498.

DEEDS — CONSTRUCTION — PAROL EVIDENCE. — The court must construe a deed to coincide with the intention of the parties as nearly as the rules of law will permit: *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404; *Cravens v. White*, 73 Tex. 577; 15 Am. St. Rep. 803, and note; *McClellan v. Spooner*, 23 Neb. 470; 8 Am. St. Rep. 128, and note; *Saunders v. Saunders*, 108 N. C. 327; *Bradish v. Yocum*, 130 Ill. 386; *Adams v. Higgins*, 23 Fla. 13; *Lemon v. Graham*, 131 Pa. St. 447; and parol evidence may be resorted to by way of explanation, to ascertain what the parties really intended: *Wilson v. Cochran*, 48 Pa. St. 107; 86 Am. Dec. 574; *Emery v. Webster*, 42 Me. 204; 66 Am. Dec. 274, and note; *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239, and note; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 838, and note; *Blow v. Vaughan*, 105 N. C. 198; *Bonaparte v. Carter*, 106 N. C. 534; *Hicklin v. McOlear*, 18 Or. 126; *Thompson v. Southern California M. E. Co.*, 82 Cal. 497; *Ellice v. McAdams*, 108 N. C. 507.

DEED — DESCRIPTION IN, CONSTRUCTION OF. — The description of lands in a deed as a particular quarter-section, "except two acres in the southeast corner," is sufficiently certain, and the exception will be construed to mean two acres in such corner, lying in a square, and bounded by four equal sides: *Green v. Jordan*, 83 Ala. 290; 8 Am. St. Rep. 711.

ZETTEL v. CITY OF WEST BEND.

[79 WISCONSIN, 314.]

PUBLIC NUISANCE. — BEFORE A PRIVATE PERSON CAN SUSTAIN AN ACTION ON ACCOUNT OF A PUBLIC NUISANCE, he must show that the damage suffered by him differs from that suffered by the public, in kind as well as in degree. Therefore he cannot maintain an action for obstructing a public street, when his only special damage is, that in driving to and from his garden he is compelled to take a more inconvenient and circuitous route.

P. O'Meara, for the appellant.

Barney and Kuechenmeister, for the respondent.

CASSODAY, J. The gravamen of the complaint is, that by reason of the construction of the school-house in Elm Street, between Fond du Lac and Elizabeth streets, the plaintiff has been compelled, in driving to and from his garden, to take a more inconvenient and circuitous route, to his damage. This is on the theory that the plaintiff has sustained special injury by reason of a public nuisance. The portion of Elm Street obstructed by the school-house is more than a block distant from each of the pieces of land owned by the plaintiff. The law applicable is well stated in one of the cases cited by the learned counsel for the plaintiff by Shaw, C. J., in these words: "It is a well-settled rule of law that if an individual suffer special damage by any unlawful act in obstructing a highway, he shall have his action, although the party doing the act is liable to an indictment. But without such damage, although the act is unlawful, and although more injurious to one proprietor on account of his proximity to the highway than another, still he cannot have an action, because actions would thereby be multiplied indefinitely; but the offender shall be prosecuted by indictment, by which the offense shall be punished and the wrong redressed once for all. What is special damage to sustain the *per quod*, and enable one to have his several action for an injury common to the whole community, is often a difficult question. It seems to be settled by authorities that it must be something not merely differing in degree, but in kind, from that which must be deemed common to all": *Thayer v. Boston*, 19 Pick. 514; 81 Am. Dec. 159. The same distinction is pointed out and fully considered by Mr. Justice Lyon in *Clark v. Chicago etc. R'y Co.*, 70 Wis. 597; 5 Am. St. Rep. 187. In order to recover, it is essential that the plaintiff allege and prove, as there said by Mr. Justice Lyon, that "the damages are special

to himself; that is, that they result from an injury of a different character from the injury suffered by the rest of the public, and not a part of the common injury caused by the nuisance." In that case it was held that the allegation to the effect that, in transporting passengers and freight up and down the river, the plaintiff was almost daily compelled to take a more distant and circuitous route with his steam-yacht, by reason of the bridge having been constructed by the defendant, did not state a cause of action. The same rule has been applied to the alteration and discontinuance of a portion of a highway: *State v. Barton*, 88 Minn. 145; *State v. Holman*, 40 Minn. 369; *School District v. Neil*, 36 Kan. 517; 59 Am. Rep. 575. In *Farrelly v. Cincinnati*, 2 Disn. 513, cited by plaintiff's counsel, the question is discussed in a very lengthy and learned opinion by Hoadly, J., and it was there, among other things, held that "a traveler who is forced to abandon his nearest route, by reason of the non-repair of the street, and seeks his destination by a longer and more circuitous road, whereby he suffers injury in his business, does not sustain such a special damage as to entitle him to an action against the party charged with the duty of keeping the way in repair. So, also, in case of an omnibus line, which has lost custom by reason of being unable to pursue its customary route in consequence of the foundered condition of a street. In these cases the damages are not the immediate consequences of the wrong, but are remote." It is manifest from the complaint in the case at bar that the only special damage of the plaintiff alleged is the same in kind, though it may be greater in degree, as would be sustained by any person having occasion to drive from the vicinity of the plaintiff's residence, or the vicinity of the east end of Elm Street, to the vicinity of the west end of that street, and vice versa. We must hold that the complaint states no cause of action.

THE COURT. The order of the circuit court is affirmed.

PUBLIC NUISANCE—WHEN PRIVATE PARTY MAY MAINTAIN ACTION FOR.—A private person may maintain an action for a public nuisance where he sustains damages different in character from that common to all: *Wyllie v. Ethood*, 134 Ill. 281; 23 Am. St. Rep. 573, and note; *San Jose etc. Co. v. Brooks*, 74 Cal. 463; *Isen v. Menley*, 76 Ga. 804; *Mehrhaf etc. Co. v. Delaware etc. R. R. Co.*, 51 N. J. L. 56; *Platt v. Chicago etc. R'y Co.*, 74 Iowa, 127; *Fogg v. Nevada etc. R'y Co.*, 20 Nev. 429; *Glaessner v. Anheuser etc. Ass'n*, 100 Mo. 508; *Meiners v. Frederick Miller etc. Co.*, 78 Wis. 364. In *Poisson v. Landry*, 123 Ind. 136, the facts are very similar to those of the leading case, and the court enunciates the same doctrine held here.

RUDE v. NASS.

[99 WISCONSIN, 321.]

LIBEL — PRIVILEGED COMMUNICATION, WHAT QUESTIONS ARE FOR THE COURT AND WHAT FOR THE JURY. — It is for the court to determine whether the subject-matter to which the alleged libel relates, the interest in it of the author, or his relations to it, are such as to furnish an excuse; but the question of good faith, belief in the truth of the statements, and the existence of actual malice must be submitted to the jury.

LIBEL — A COMMUNICATION IS PRIVILEGED, though made by one who has no interest therein, and no duty to perform in making it, if made to one having an interest in and a right to know and act upon the facts stated. If a person is so situated that it becomes right, in the interests of society, that he tell a third person the facts, then if he, *bona fide* and without malice, tells them, it is a privileged communication.

LIBEL — PRIVILEGED COMMUNICATION. — If a man is accused of seduction, and a friend of the father of the girl alleged to have been seduced, at the instance of the father, writes to a clergyman, who has been acquainted with the accused, for an account of his conduct while the clergyman knew him, and the latter gives such account in good faith and without malice, it is privileged, and not libelous, and no recovery can be had therefor.

JURY TRIAL. — AN INSTRUCTION THAT AN HABITUAL DRUNKARD "means more than being drunk on two or three occasions within a given time, — two or three times within a given number of months; that it means the use of intoxicating liquors to such an extent as to in some manner disqualify a man from pursuing his avocation; but you can perhaps define it as well as the court," — does not entitle the losing party to a reversal on the ground that this last clause left it to the jury to define for themselves the words "habitual drunkard."

ACTION against the defendant, a Norwegian Lutheran minister, for libel. The plaintiff, while carrying on the business of a teacher of vocal music, was arrested on a charge of feloniously seducing and debauching an unmarried woman. Her father procured a friend to write to the defendant, asking the latter to furnish all information within his knowledge of the conduct of the accused while he lived in the congregations of which the defendant had charge. The defendant responded in a lengthy letter, giving an account of the accused not at all creditable to him, and describing him as "a person of an in a high degree immoral character, an habitual drunkard, a fighter, dishonest in his trade, lascivious and frivolous in his conduct, whose words are not to be believed." The defendant pleaded that the letter was a privileged communication, made in good faith, in the belief of its truth, and without malice, and was in fact true. The jury rendered a verdict for the defendant, and the plaintiff appealed.

Bashford, O'Connor, and Polleys, for the appellant.

Brooks and Blanchard, and Olin and Butler, for the respondent.

CASSODAY, J. The printed case, like many others, is unnecessarily voluminous. It contains over three hundred pages of testimony. It should only "consist of a sufficient statement of the return" to intelligently present the question relied upon for a reversal: Sup. Ct. rule 8.

The principal point upon which the plaintiff seeks a reversal is the portion of the charge relating to privileged communications. After stating the general nature of communications which were absolutely privileged and those which were only privileged conditionally, depending upon the circumstances under which they were made, the trial judge charged the jury as follows: "I instruct you as a matter of law, that if this letter of the 3d of August, 1886, was written by this defendant, believing it to be true, in good faith, without malice, then it was a privileged communication, and this action cannot be maintained. It is the end of the case if you should find that it is a privileged communication under this rule that I have given; and so you will examine the evidence upon that point." He then calls their attention to the "vast amount of evidence in the case," and directs them to consider it all, and determine whether the communication was made "in good faith, believing it to be true, and without malice." The verdict determined that question in favor of the defendant, and the evidence is sufficient to support the verdict. Upon the same question the court refused to charge, that "in order to make an article privileged, two things must concur: 1. The party making the charge must make it *bona fide*, and without malice, and with reference to some subject-matter in which he has an interest, or in reference to which he has a duty to perform; 2. It must be made to a person having a corresponding interest and duty. There is nothing disclosed by the evidence in this case which shows that the relation of the defendant to the plaintiff or to Sivesind, to whom the defendant wrote the letter, which would make the occasion of the publishing of the alleged libel privileged." The important question, therefore, is, whether there was error in submitting to the jury the questions of malice, good faith, and belief in the truth of the communication, or in giving the

portion of the charged quoted, or in thus refusing to charge as requested.

The learned counsel on both sides agree to the rule as stated by Folger, C. J., and held in New York, "that it is for the court to determine whether the subject-matter to which the alleged libel relates, the interest in it of the author of it, or his relations to it, are such as to furnish an excuse; but that the question of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury: *Hamilton v. Eno*, 81 N. Y. 122. Under this rule, the question whether the alleged libel was conditionally privileged was manifestly a mixed question of law and fact, to be submitted to the jury under the charge of the court. That is what was done in this case. But counsel contend, in effect, that, assuming, as we must upon the verdict, that the defendant wrote and sent the letter, believing it to be true, in good faith, and without malice, yet the circumstances were not such as to make it privileged. They contend that, in order to be privileged, the defendant should have had an interest in the subject-matter of the letter, or some duty to perform in reference thereto, and also that the person to whom it was addressed should have had a corresponding interest or duty; and they cite decisions of learned courts in support of such contention. Some of those decisions, however, are inconsistent with others made by the same courts.

In *Noonan v. Orton*, 32 Wis. 112, Dixon, C. J., approvingly quotes the language of Shaw, C. J., as follows: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice": *Bradley v. Heath*, 12 Pick. 164; 22 Am. Dec. 418. These cases were cited approvingly in *Missouri Pac. R'y Co. v. Richmond*, 73 Tex. 575; 15 Am. St. Rep. 794. This alternative statement only makes it necessary that there be an interest or duty on the part of the person making the communication, or on the part of the person to whom it is made, in order that it be conditionally privileged. There are certainly many cases holding that such communication may

be conditionally privileged if made to one having an interest in and a right to know and act upon the facts therein stated: *Weatherston v. Hawkins*, 1 Term Rep. 110; *Toogood v. Spry*, 1 Crompt. M. & R. 181; *Kins v. Sewell*, 3 Mees. & W. 297; *Robshaw v. Smith*, 38 L. T., N. S., 423; *Waller v. Lock*, 45 L. T., N. S., 242; *Tompson v. Dashwood*, L. R. 11 Q. B. Div. 43; *Atwill v. Mackintosh*, 120 Mass. 177; *Sunderlin v. Bradstreet*, 46 N. Y. 191; 7 Am. Rep. 322; *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 166.

Thus in *Robshaw v. Smith*, 38 L. T., N. S., 423, it was said by Grove, J., speaking for the court: "The defendant did not act as a volunteer, but was applied to for information. When applied to, he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. . . . Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained." Lindley, J., was of the same opinion, and said: "I think it would be a lamentable state of the law if, when a person asks another for information, that other could not give such information as he possessed without exposing himself to the risk of an action." Upon a review of the authorities, that case and these expressions were fully sanctioned by Jessel, M. R., in *Waller v. Lock*, 45 L. T., N. S., 242, who went still further, and said: "If the answer is given in the discharge of a moral and social duty, or if the person who gives it believes it to be so, that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one. The law is concisely stated by Lord Blackburn . . . thus: 'Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person facts, then if he, *bona fide* and without malice, does tell them, it is a privileged communication.' It appears to me that if you ask a question of a person whom you believe to have the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is a privileged communication. I might illustrate this by the instances of inquiries being made of a friend or a neighbor

about a tradesman, a doctor, or a solicitor. Society could not go on without such inquiries. The whole doctrine of privilege must rest upon the interest and the necessities of society. If every one was open to an action of libel or slander for the answers he might make to such inquiries, it would be very injurious to the interests of society." The eminence of that late learned master of the rolls who thus expressed the opinion of the court, and the confusion among some of the adjudications, seem to justify the lengthy quotation made.

In view of these authorities, and others which might be cited, it seems to us that the father of the girl who made the complaint upon which the plaintiff had been arrested had an interest in the communication sent by the defendant, and had the right to know and act upon the facts therein stated; and hence, had the letter been written by the defendant in answer to inquiries made by the father personally, it would have been conditionally privileged. The mere fact that the letter was written by the defendant in answer to inquiries made by another for and in behalf of the father does not take away the privileged character of the communication. This is manifest from some of the authorities cited. We must hold that there was no error in submitting the case to the jury on the theory that the communication was conditionally privileged. The court also, under the alleged justification in the answer, submitted to the jury the question whether all the charges contained in the letter were true, with specific directions to find for the plaintiff if any one of them was false. The verdict, in effect, found them all true, and there appears to be sufficient evidence to support the verdict in that regard.

Exception is taken because the court charged the jury as follows: "I think an habitual drunkard means more than being drunk on two or three occasions within a given time,—two or three times within a given number of months; that it means the use of intoxicating liquors to such an extent as to in some manner disqualify a man from pursuing his avocation; but you can perhaps define it as well as the court." It is claimed that this last clause left the jury to define for themselves the words "habitual drunkard." The court had, however, already defined those words sufficiently favorably to the plaintiff, and what was added was merely to indicate that the words were not such as to admit of a precise definition, though well understood by the public. Manifestly the

jury were not misled by the charge. We find no material error in the record.

The COURT. The judgment of the circuit court is affirmed.

LIBEL — PRIVILEGED COMMUNICATION. — Whether or not a publication is privileged is a question of law for the court: *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819, and note; *Barrow v. Bell*, 66 Am. Dec. 479, and extended note; *Howard v. Thompson*, 21 Wend. 319; 34 Am. Dec. 238, and note.

LIBEL — PRIVILEGED COMMUNICATIONS, WHAT ARE. — A privileged communication, within the meaning of the law of libel, is one made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or probable cause: *Conroy v. Pittsburgh Times*, 139 Pa. St. 334; 23 Am. St. Rep. 188, and note; *Chaffin v. Lynch*, 84 Va. 884. A communication made in good faith, in the honest belief of its truth, and under a conviction that the maker owed a duty to the party to whom it was made, is privileged: *Fresh v. Cutter*, 73 Md. 87. A slanderous communication is not privileged, unless the party making it had some interest in the subject-matter: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note.

DEFINITION. — HABITUAL DRUNKENNESS: See *Young v. Young*, 130 Ill. 230; 17 Am. St. Rep. 313; *Mahone v. Mahone*, 19 Cal. 626; 81 Am. Dec. 91, and note.

JOHNSON v. FIRST NATIONAL BANK.

[79 WISCONSIN, 414.]

CORPORATION — THE KNOWLEDGE OF THE OFFICERS, AGENTS, AND EMPLOYEES OF A CORPORATION, THROUGH WHOM IT MUST ACT, IS IMPUTED TO IT.

MASTER AND SERVANT — VICE-PRINCIPALS. — If a corporation employs a superintendent and foreman in the construction of a building, who employ and discharge workmen, and direct them what to do, such superintendent and foreman are vice-principals in respect to their employers.

MASTER AND SERVANT. — IF A CORPORATION, THROUGH ITS AGENTS AND EMPLOYEES, THROWS SNOW AND OTHER MATTER UPON A SHED, and suffers it to remain there until, from this additional weight, the shed falls upon and injures a common laborer, whose duty it was to work therein, and who had no knowledge of the burden which had been placed on the shed, he is entitled to recover of the corporation for the injuries sustained.

MASTER AND SERVANT. — IF THERE ARE INCREASED PERILS IN A BUSINESS BY REASON OF THE USE OF DEFECTIVE APPLIANCES, or otherwise, known to the master, or for which he is responsible, and unknown to the servant, if the latter is injured thereby, and is free from negligence, the master is liable.

MASTER AND SERVANT. — THE MASTER'S DUTY REQUIRES HIM TO USE REASONABLE DILIGENCE IN SEEING THAT THE PLACE WHERE HIS SERVANTS WORK is safe, and he is answerable if he directs the servant to work in a place which the master knew, or ought to have known, was

unsafe, if the servant, being without negligence, is injured, though the negligence of a fellow-servant may have contributed to the injury.

MASTER AND SERVANT. — THE NEGLIGENCE OF A FELLOW-SERVANT CONTRIBUTING TO THE INJURY OF PLAINTIFF will not preclude his recovery of his master for such injury, if it was caused by the master's requiring the servant to work in a place which the master knew, or ought to have known, was not safe.

JURY TRIAL. — INSTRUCTION TO A JURY, that if they find plaintiff is not guilty of any want of ordinary care which contributed directly towards his injury he is entitled to recover, does not entitle the defendant to a reversal, if the judge had, in other instructions, gone fully over every question involved in the case, and stated all the conditions of the plaintiff's recovery or defeat.

Tomkins, Merrill, and Smith, for the appellant.

Frank A. Ross and Eric L. Winje, for the respondent.

ORTON, J. The following are substantially the facts of this case: In December, 1887, the appellant bank had about finished the construction of a three-story brick bank building. One B. B. Scott was the superintendent of the entire work, and one Robert Huston was the superintendent or foreman of the mason-work, and they both employed and discharged the workmen in and about said building. There was a shed, made of boards, built under the direction of the said Scott or Huston, in the rear of the bank building, and about seven feet from it, as a shelter for brick, and a large quantity of brick was piled up in it. A short time before the accident, *débris* of broken brick and mortar, and other refuse, had been thrown from the windows of the bank building down upon the roof of the shed, and deep and damp snows had fallen on it, and remained there, which added great weight to the roof, and finally caused it to fall. The employees of the bank had removed the snow from the nearly flat roof of the bank building as a proper precaution against its weight. The plaintiff had been employed by the bank as a common laborer about eighteen days before, and on the morning of the third day of December, 1887, was employed in carrying brick from the shed to the alley back of it, and while in the shed for such purpose, the roof fell on him by its superincumbent weight, and badly injured him. The shed was built before the plaintiff was employed, and he did not know of the brick, mortar, and other refuse on its roof, and had not observed the snow on it. Another laborer was working with him, who heard the noise of the falling roof and escaped, while the plaintiff was caught and pinioned by

it while trying to escape. The business of the bank was transacted by a board of directors, and they employed the said Scott and Huston. The plaintiff recovered fifteen hundred dollars, and the defendant has appealed.

1. The first point made by the learned counsel of the appellant embraces several minor propositions, such as, — 1. That the shed was better constructed than such sheds usually are; 2. That the master retained no supervision over its erection; 3. But employed good materials and skilled workmen in its erection.

There is no complaint that the shed was not properly built, or of the workmen or materials. The shed fell in consequence of the unusual weight upon its roof. This makes the above propositions inapplicable and immaterial. The only pertinent position is, that the bank had no more knowledge of the snow and rubbish on the roof than the plaintiff.

The defendant is a corporation, that must in all cases act through officers, agents, and employees, so that the knowledge of such agents must be imputed to and is the knowledge of defendant. It is not to be supposed that the mere common laborer who threw this rubbish on the roof did so without the direction of those who had the right to do so. It was in evidence that snow, also, had been thrown from the roof of the bank building upon the roof of the shed, which added to the weight of the snow that naturally fell on it. It does not appear who placed this additional weight on the roof of the shed. Those under whose direction it was done knew of it, and they might have reasonably supposed that it would endanger the roof. The common laborers who did the work are not presumed to have known that such additional weight to the roof would be allowed to remain there until it caused the roof to fall. It did not fall while it was being placed there. Wherein, therefore, were they who did the work negligent? It was the constant and increasing pressure of its weight that made the roof fall. Those who let it remain there were guilty of the negligence, and they were those who were acting in the place of the company, and for whose acts the company was responsible.

The company, therefore, knew that there was danger to the roof in letting the rubbish and snow remain on it. The plaintiff testified that he did not know of it, and had not observed it. It was certainly not within the common observation of the plaintiff and others who were engaged in carrying

brick out of the inside of the shed, so that they might be presumed to know of it. Everything done about that building or the shed must have been done under the direction and supervision of either Mr. Scott or Mr. Huston, and they acted in all things for and in place of the company. They had the sole control of all things for the corporation, and exercised all the power, judgment, and discretion of the corporation, and filled the place of masters in all things within their powers and duties as superintendents. They not only employed men, and paid them, but they directed them what to do. There is no chance for an argument that these two men were not vice-principals in respect to the plaintiff and other employees. The facts of the case, therefore, make the first point in the appellant's brief impertinent and inapplicable.

The next point made by the learned counsel of the appellant is in part but a repetition of the first, but in addition, that if the plaintiff, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against his employer merely because the business might be carried on in a safe mode. But the plaintiff did not know of this hazard in his employment, and that is a sufficient answer to this point. The learned counsel very candidly, in this connection, state the following proposition, that appears to be quite applicable to the case made by the evidence: "But if there are increased perils in the business, by reason of the use of defective appliances or otherwise, known to the master, or for which he is responsible, and unknown to the servant, if the latter is injured thereby, and is free from negligence, the master is liable." The facts show that there were "increased perils in the business" by this increased weight of the roof above the plaintiff's head, and out of his sight, which rendered "the appliances of his labor defective, and which were known to the master, and for which he was responsible, and unknown to the plaintiff, and he was free from negligence." That being so, the learned counsel admit that the defendant bank is liable. This seems to be a fair and truthful statement of the plaintiff's case, and a correct statement of the law.

3. The learned counsel of the appellant further contend that if there was negligence it was that of the plaintiff or of his co-employees, and that the carpenters who built the shed, and the workmen who threw the rubbish and snow on the

roof, and Huston, the foreman and superintendent of the mason-work, were the co-employees of the plaintiff.

There is no evidence that the shed was not properly built. Its having fallen in is no evidence that it was not, because all the witnesses agree that it was the rubbish and snow thrown upon it that caused it to fall. We have already seen that the employees who threw the rubbish and snow upon the shed were not negligent. The roof did not fall while they were at work, and there is no evidence that they supposed the rubbish and snow would be allowed to remain there. They had the right to suppose that they would be directed to throw it off. Then, again, they were incapable of judging how much weight the roof would bear, and to decide, even in their own minds, that it was thereby rendered liable to fall. This was not their business, and no part of their employment. They were there to obey the instructions of the foreman or superintendent, and not to plan the work or make mathematical calculations of the strength of the roof. If these workmen were fellow-servants of the plaintiff when they did this work, not the least negligence can be imputed on them. Mr. Scott and Mr. Huston were skilled mechanics, and were employed by the company because they were so, and they were capable of forming a reliable opinion and an intelligent judgment as to how much weight such a shed would bear; and they, or one of them, was present, superintending the work, in the place of the corporation, as vice-principal. It was their business to know that such an increased weight thrown on the roof and remaining there would cause it to fall as it did fall. It was most clearly their negligence, and if theirs, it was also that of the corporation, that the roof was so overloaded as to break it down. All of these points are sufficiently answered by the facts of the case, and all the legal positions assumed by the learned counsel of the appellant are clearly inapplicable to the case.

It is elementary law that the master must furnish a safe place in which he requires his servant to work, and furnish him with safe appliances. The defendant is liable to the plaintiff for an injury caused by its agents permitting such a weight to be thrown and remain on the roof of the shed in which the plaintiff was required to do his work as to render his work unnecessarily hazardous: *Bessex v. Chicago etc. R'y Co.*, 45 Wis. 477. The general duty of a master to exercise care to prevent the exposure of his servant to unnecessary

and unreasonable risk requires him, among other things, to use diligence in seeing that the place where he works is safe: *Cook v. St. Paul etc. R'y Co.*, 34 Minn. 45; *McDonald v. Chicago etc. R. R. Co.*, 41 Minn. 439; 16 Am. St. Rep. 711; 2 Thompson on Negligence, sec. 772. The act of the defendant in ordering the plaintiff to work in a place that was not safe, and which caused him injury, makes the defendant liable if the defendant knew or ought to have known that such place was unsafe, although the negligence of a fellow-servant may have contributed to the injury, if he was himself free from fault: *McMahon v. Henning*, 3 Fed. Rep. 353; *Heckman v. Mackey*, 35 Fed. Rep. 353. If the injury was caused by the negligence of the defendant corporation in requiring the plaintiff to work in a dangerous place, the negligence of a co-employee will not defeat a recovery: *Stetler v. Chicago etc. R'y Co.*, 46 Wis. 497; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151. In view of the authorities in application to the facts, the liability of the defendant in this case seems to have been established. The superintendent, Scott, and the foreman, Huston, were responsible between them for the falling of the shed. They probably ordered the rubbish and the snow to be thrown on the shed, and at least knew of it. They ordered the snow to be thrown from the roof of the bank building upon the shed, to keep it from breaking down the roof of that building, but were careless and negligent as to its greater liability to break down the roof of the shed. They made a "deadfall," and required the plaintiff to work under it.

4. The only exception noticed in the brief of the learned counsel of the appellant to the instructions of the court is to the following sentence: "If you find that he [plaintiff] is not guilty of any want of ordinary care which contributed directly towards his injury, he is entitled to recover." The learned judge had gone over fully every question involved in the case, and all the conditions of the plaintiff's recovery or defeat, before giving this instruction, and afterwards repeated them. The jury could not possibly have understood that the finding of this one fact entitled the plaintiff to recover. It is an unfair, garbling criticism of the charge. There is no written work, not excepting the sacred Scriptures, that could not be condemned by garbled and selected passages cut out and carried away from the context. All the other conditions upon which the plaintiff would be entitled to recover had been given, and were afterwards repeated, and the instruc-

tions, taken together, as they should be, are perfect or beyond criticism. This is no error: *Goll v. Manhattan R'y Co.*, 5 N. Y. Supp. 185; 24 N. Y. St. Rep. 24. We are unable to find that any error was committed in the trial, or that any principle of law was violated by the plaintiff's recovery.

The COURT. The judgment of the circuit court is affirmed.

CORPORATIONS — NOTICE TO OFFICERS IMPUTED TO CORPORATION. — The knowledge of the president of a corporation is imputed to the corporation: *Webb v. Graniteville etc. Co.*, 11 S. C. 396; 32 Am. Rep. 472. Notice to the board of directors is notice to the corporation: *Bank v. Whitehead*, 10 W. Va., 397; 36 Am. Dec. 186, and extended note.

MASTER AND SERVANT — LIABILITY FOR ACTS OF VICE-PRINCIPAL. — A vice-principal, so long as he acts in the discharge of the duties which the principal owes the employees, represents the principal, and the latter will be responsible for his acts: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note; *Neilon v. Marinette etc. Co.*, 75 Wis. 579; *Hume v. Michigan etc. R. R. Co.*, 78 Mich. 513; *Consolidated etc. Co. v. Wombacher*, 134 Ill. 57.

MASTER AND SERVANT — MASTER'S DUTY TO FURNISH SAFE TOOLS, ETC. — An employer must provide his laborers with a suitable place to work, with suitable tools and machinery to use, and with suitable materials: *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160, and note. A master must provide his employees with reasonably safe appliances: *Kern v. De Castro etc. Co.*, 125 N. Y. 50; *Railway Co. v. Aiken*, 89 Tenn. 245; *Bomar v. Louisiana etc. R. R. Co.*, 42 La. Ann. 983; *Donahue v. Railroad Co.*, 32 S. C. 259; *Union Pac. R'y Co. v. Fry*, 43 Kan. 750.

A master must furnish a reasonably safe place for his employee to work: *Roth v. Northern P. etc. Co.*, 18 Or. 205; *Sampson etc. Co. v. Schaad*, 15 Cal. 197; *Rogers v. Leyden*, 127 Ind. 50.

MACKEY v. COLE.

[79 WISCONSIN, 425.]

RECORD OF A CHATTEL MORTGAGE EXECUTED IN AN ASSUMED AND FICTITIOUS NAME does not impute notice to a purchaser who finds the mortgagor in the possession of the property mortgaged and purchases it of him, without notice that he had made the mortgage or done business in the assumed and fictitious name.

Lamoureux, Gleason, Shea, and Wright, for the appellant.

Tomkins, Merrill, and Smith, for the respondent.

COLE, C. J. This is an action of replevin to obtain possession of a span of horses. The plaintiff claims the horses by virtue of a chattel mortgage given to him in Minneapolis by one McPherson, December 16, 1889. McPherson was the owner of the horses, but executed the mortgage on them in

the name of John Doyle, who had no interest in them. The business for the plaintiff was transacted at Minneapolis by an agent, who did not know McPherson when he applied to him for the loan of \$210, which amount the agent had in his hands to loan for the plaintiff. When McPherson applied for the loan he gave his name as John Doyle, stated the street and number where he lived, and also gave the name of a company that he had worked for several years. The agent made inquiries about Doyle of those who had employed him; went to the residence, where he found McPherson, who had assumed the name of Doyle in order to carry out his fraudulent purpose; and the agent, becoming satisfied that Doyle was a reliable man, and supposing he was dealing with him, made the loan and took the mortgage. So far as the agent was concerned, there does not seem to be anything in the transaction which should have made him suspect from the inquiries made that McPherson was not the man he represented himself to be. He therefore received the chattel mortgage, placed it on file in the proper office, and advanced the \$210 on the mortgaged property. It was provided in the mortgage that the mortgagor might retain possession of the property until default in payment or breach of condition in the mortgage, but if any attempt was made by the mortgagor to dispose of the property or remove it, the mortgagee was authorized to take possession of it, and sell it under the mortgage. About ten days after the mortgage was given, McPherson took the horses in controversy to Ashland, in this state, and sold them to the defendant, who, it is admitted, was a *bona fide* purchaser for value, with no notice of any lien on the property other than would be implied from the filing of the mortgage in the city clerk's office in Minneapolis. So the question presented is, Which of two innocent persons must suffer from the fraud of McPherson, — the mortgagee or the purchaser? The learned circuit court ruled that the loss must fall upon the former, for the reason that neither he nor his agent had used due diligence to find out McPherson's name, and if he had done so, he would have detected his fraud, while no degree of diligence would have enabled the purchaser to discover it.

It is not necessary, in the view we have taken of the case, either to affirm or disaffirm this view of the circuit court; for we do not see how the plaintiff can hold the property upon the facts disclosed in the evidence. Now, assuming that the

law of Minnesota in regard to filing chattel mortgages is the same as that of this state, as we must do, there being no proof to the contrary, suppose the defendant had purchased the horses of McPherson in Minneapolis, on what principle of law would he have been chargeable with notice that there was a mortgage upon them? If he had examined the record, he would have found no mortgage on file given by the real owner, McPherson, to the plaintiff. As between McPherson and the plaintiff, the mortgage would undoubtedly be valid, for the simple reason that McPherson would be estopped from saying that the name of Doyle, which he had assumed for the fraudulent purpose, was not his true name. But how could a purchaser from McPherson ascertain that there was a valid mortgage on the property? The record certainly would not show it, giving it all the effect it could have as notice. We are therefore utterly unable to perceive how filing a chattel mortgage purporting to have been given by John Doyle could affect a purchaser of the property from McPherson, who had the possession and was the apparent owner. If the purchaser should by chance in his examination come across the mortgage on file executed in the name of John Doyle, there would be nothing in the description of the mortgaged property described as one chestnut horse, or one bay mare, of such an age and weight, as would aid to identify the property as that which he was about to purchase of McPherson, for there were many animals which would fully answer the description of the mortgage. So the record of the mortgage would give no information nor lead to any knowledge of the fact that a mortgage existed against the horses.

But it is said the rule of *caveat emptor* applies to the purchaser. But how the application of that rule aids the plaintiff's case is not obvious. Suppose the chattel mortgage, whether given in the right name or a fictitious name, had never been placed on file, would the rule that the buyer must beware charge the purchaser with knowledge that a mortgage existed, or that McPherson's title was defective? and if so, upon what principle of law would he be so chargeable with notice of the fact? For, as we have observed, the record fails to show that McPherson had given any mortgage on the horses. Then how could the purchaser be charged with knowledge of the fact? We do not see how he could be.

This conclusion is in conflict with the decision in *Alexander v. Graves*, 25 Neb. 453, 13 Am. St. Rep. 501, which seems

to be the nearest in point of any cases we have found in our investigation. This case was referred to by counsel on the argument. The head-note states the decision fairly, as follows: "A purchased certain personal property from B on time, and for the purpose of securing the purchase price, executed a chattel mortgage on the property purchased. The purchase was made and the chattel mortgage executed under an assumed and fictitious name. The parties to the transaction being unacquainted, the vendor supposed the name given was the true name of the purchaser. The purchaser stated that his residence was in Webster County, which was correct, and the mortgage was duly filed in the proper office in that county. Subsequent to the filing of the mortgage, A sold the property to C, under his true name, after C had examined the records for chattel mortgages executed by A and found none. In an action of replevin by B against C for the possession of the mortgaged property, it was held that B should recover judgment." If we understand the principle of this decision, the court holds that the purchaser had constructive notice of the existence of the prior chattel mortgage from the record. But we are unable to perceive how that conclusion follows, and consequently, with the utmost respect for the learning and authority of that court, we feel constrained to dissent from the decision there made.

It is certainly true, under our decisions, that a chattel mortgage passes the title of the property conditionally to the mortgagee, and where the mortgaged property is retained by the mortgagor, the statute makes the filing of the mortgage in the proper office equivalent to an actual change of possession: Rev. Stats., sec. 2314. But this provision of law goes upon the assumption that the instrument is executed by a party who has an interest in the property which could be mortgaged. We cannot see how it can in reason apply to a mortgage executed under an assumed or fictitious name, so far as third persons are concerned. A mortgage is not effectually recorded where the instrument is executed under a fictitious or false name. This proposition seems too plain for argument. So we must hold that if the defendant had purchased the horses of McPherson in Minneapolis, there was nothing on record to charge him with notice of plaintiff's mortgage; *a fortiori* nothing to charge him with such notice at Ashland, in this state.

This view disposes of the case, and renders it unnecessary to consider the other questions discussed on the argument.

The Court. The judgment of the circuit court is affirmed.

NOTICE — REGISTRATION OF MORTGAGE. — The record of a mortgage is constructive notice only of what appears on the face of the instrument as recorded: Note to *Parker v. Conner*, 45 Am. Rep. 189, 190; *Barrett v. Fisch*, 76 Iowa, 552; 14 Am. St. Rep. 238; *Warner v. Wilson*, 73 Iowa, 719; 5 Am. St. Rep. 710; *Stewart v. Jaques*, 77 Ga. 365; 4 Am. St. Rep. 86; *Shepherd v. Burkhalter*, 13 Ga. 443; 58 Am. Dec. 523, and note. But compare *Alexander v. Graves*, 25 Neb. 453; 13 Am. St. Rep. 501.

LYON v. FAIRBANK.

[79 WISCONSIN, 455.]

A PATENT OF LANDS MUST BE CONSTRUED IN CONNECTION WITH THE MAP WHICH ACCOMPANIED IT, TOGETHER WITH THE SURVEYS AND FIELD-NOTES, and if the description in the patent is "lot 1, section 6," this will include all of the lot represented on the map and field-notes, though if the lines between sections 6 and 7 were continued, a part of such lot would be in section 7.

LAND-OWNER'S RIGHT TO REMOVE INTRUDERS. — Owners of land on which a trespasser has entered and placed buildings and other structures have the right to remove him and the structures by force, if they can do so without a breach of the peace; and even though they use so much force and violence as to subject them to indictment at common law for a breach of the peace, or, under the statute, for making a forcible entry, they are not liable to an action of trespass, nor for assault and battery, nor for injury to the trespasser's structures so removed, unless they used more force than was reasonably necessary to accomplish his removal and that of his structures and goods.

TRESPASS. — THE QUESTION OF TITLE TO REAL ESTATE MAY BE RAISED IN AN ACTION OF TRESPASS, where the defendants insist that they had a right to do what they did, because they were the owners and entitled to the possession of the property, and the plaintiffs were trespassers thereon.

ACTION of trespass against the defendants for wrongfully, willfully, and maliciously entering upon certain land in section 7, and tearing down and removing a dwelling-house and certain fences thereon. The defense was, that the defendants were the owners of the premises on which the alleged trespass was committed; that they were not in section 7, but were part of lot 1 of section 6; that the plaintiff had unlawfully and wrongfully entered thereon, and built some structures which interfered with the defendants' possession, and the defendants therefore removed the same. The premises upon which the trespass was alleged to have been committed

consisted of about six acres of land, being the southerly portion of lot 1 of fractional section 6. This lot 1 consisted of a point of land extending into Geneva Lake, and the part in controversy would have formed a portion of section 7, if any such section had been recognized by the United States land-officers. The maps, plats, and field-notes, however, showed that the tract of land designated as lot 1 of section 6 in fact included the premises in controversy, and extended as far southerly as the waters of the lake named. There was no doubt that, after the plaintiff had entered upon the premises and commenced to erect a house and other structures, the defendants early one morning awakened plaintiff's workmen and ordered them off, announcing their intention to immediately tear down the house; that the workmen thereupon vacated the premises, taking away their goods, and defendants immediately removed the doors and windows of and partially destroyed the house, and tore up the fence and a pier. The trial court directed a judgment of nonsuit; the plaintiff appealed.

J. F. Lyon and Son, for the appellant.

John T. Fish and John B. Simmons, for the respondents.

COLE, C. J. We think the nonsuit in this case was clearly right. In granting the motion the learned circuit judge made some remarks in regard to the title of the premises in controversy which express our views upon the subject very clearly. The judge, in substance, said that the patent originally granted to Wadsworth and Dyer conveyed the whole of this parcel of land, including the piece or point in dispute, to the patentees; that though the patent describes the land as "lot 1, section 6," yet the map which accompanied the patent showed that lot 1 extended to Lake Geneva. The proofs made, together with the maps, surveys, and field-notes, including the records from the general land-office, conclusively establish the fact that lot 1, section 6, included the point, though if the line between sections 6 and 7 were continued, it would cut off the point. But the records themselves conclusively prove that the whole tract to the lake passed by the patent to Wadsworth and Dyer, and the ownership thereof has become vested in the defendants Fairbank and Meatyard by mesne conveyances.

There can be no doubt but this view is correct, and it is impossible, upon the evidence, to adopt any other. All the

testimony tends to show that the piece in dispute was intended to be included, and was in fact embraced, in the tract which was sold by the general government to Wadsworth and Dyer in 1839; and it would be a waste of time to attempt to make more plain a fact which is so clearly manifest from a mere inspection of the plats and public records themselves. Consequently nothing could be more appropriate to the case than the language used by the register and receiver of the Menasha land-office on the application of Mr. Lyon to enter this piece,—that the field-notes and records in the office show that the tract was included in lot 1, section 6, both in the survey and the sale of that lot. This fact we deem so clearly and exclusively established by all the testimony bearing upon the question that we shall assume it as a verity in the case: *Shufeldt v. Spaulding*, 87 Wis. 662; *Whitney v. Detroit L. Co.*, 78 Wis. 240.

In the answer, the defendants Fairbank and Meatyard justify their acts on the ground that they owned and occupied the disputed piece, it being a part of lot 1; and that the plaintiff unlawfully and wrongfully entered upon the same, and tortiously placed and built some structures thereon, which interfered with their possession and enjoyment of the premises; and that the defendants, without any unnecessary force, removed such structures from their land. Now, the question is, Does not this show a good justification, if the acts complained of are sustained by the proof? The defendants were the owners of the land, entitled to the possession, and in fact having the possession; and they find an intruder has entered upon it, and wrongfully erected a structure thereon. Have they not the right, under the circumstances, to remove the trespasser and his structure, if they could do so without a breach of the peace? The proposition seems to us too plain for argument. We cannot see how it can with reason be claimed that the owner cannot use sufficient force to remove the wrong-doer and defend his possession against a mere trespasser, providing no breach of the peace is committed. It is said the owner should resort to his legal remedy for redress; that is to say, if a man leaves his residence with his family for a temporary period, and on returning finds that some intruder has entered on his grounds, erected a shanty before his door, and is living there, the position is, that such owner cannot order the trespasser away, and put his shanty in the streets, with the other portable articles, using such force as may be necessary for the

purpose, but must bring an action at law to oust the intruder. If there is any authority to sustain such an absurd position we certainly decline to follow it. It is said the law will not allow any one to break the peace, and redress his private wrongs by force. He may use force to defend his lawful possession, but being dispossessed, he has no right to recover possession by force and by a breach of the peace. But if he can remove the intruder and regain the possession without the use of such violence as amounts to a breach of the peace, can he not do so?

In the case at bar the circuit judge well observed that the first person making an unlawful entry or trespass on the land in dispute was the plaintiff himself, and it is insisted by his ingenious and able counsel that the defendants acted illegally in removing the structures which had been erected, and should have waited for the slow process of a court of law. We are unable to concur in that view. We adopt the remarks of Erle, C. J., as employed by him in *Blades v. Higgs*, 10 Com. B., N. S., 720, where he says: "It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land, as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified." See *Newton v. Harland*, 1 Man. & G. 644; 1 Scott N. R. 474. But in respect of land that argument has been overruled in *Harvey v. Brydges*, 14 Mees. & W. 442. Parke, B., says: "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed."

These remarks of the English judges, which are in harmony with the views expressed in many cases in this country cited on the briefs of defendants' counsel, fully dispose of the main

contention of the plaintiff. The answer was amply sustained by the proof in the case, and there was no unnecessary violence used nor breach of the peace committed in removing the structures. Everything that was done to remove these unlawful obstructions seems to have been done as quietly and peaceably as the calm summer morning on which it occurred. The defendants did not enter and take possession of their own premises with a strong hand and multitude of people, so as to cause terror or alarm to any one. If they had done so, they might have been liable on information for their criminal act, but would not be liable to the plaintiff in this action of *quare clausum*. Professor Washburn says the law as generally adopted in the United States "may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enter and expel the occupant, but makes use of no more force than is reasonably necessary to accomplish this end, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or, under the statute, for making forcible entry": 1 Washburn on Real Property, 5th ed., *397. The text of the learned author is fully sustained by the cases referred to in note 1.

But it is said the question of title to real estate cannot be raised and tried in an action of trespass; but it surely is done in various ways, where the right of title to property is put in issue by the pleadings: See *Warner v. Fountain*, 28 Wis. 405; *Stephenson v. Wilson*, 37 Wis. 482. Ordinarily, actual possession is sufficient to sustain the action of trespass to real estate. But here the possession being in dispute, the parties saw fit to put in issue the title to the land. The question of title has been fully tried, and found to be in the defendant Fairbank. That is sufficient to dispose of the case. It is not necessary to consider the law applicable to the action of forcible entry and detainer, because this is not such an action. This, as has been said, is an action *quare clausum*, and the defendants relied upon their legal title and possession to justify their acts. We perceive no reversible error in the case, and the judgment of the circuit court is affirmed.

The Court. Judgment affirmed.

QUESTION OF TITLE, NOW RAISED IN POSSESSORY ACTIONS: See note to *Beeler v. Cardwell*, 77 Am. Dec. 552. As to actions in which title to realty cannot be raised, see extended note to *King v. Mason*, 89 Am. Dec. 427-436. Compare *Lego v. Medley*, 79 Wis. 211, ante, p. 706. In actions of trespass, defendants may set up the plea of *liberum tenementum*: *Crockett v. Leachbrook*, 5 T. B. Mon. 531; 17 Am. Dec. 98; *Tribble v. Frame*, 7 J. J. Marsh. 599; 23 Am. Dec. 439; and under such plea, records, papers, etc., bearing upon the paramount title of either party are admissible: *Wilsons v. Bibb*, 1 Dana, 7; 25 Am. Dec. 118.

TRESPASS. — RIGHT OF OWNER TO ENTER UPON HIS LAND: See note to *Beeler v. Cardwell*, 77 Am. Dec. 552; *Mosseller v. Deaver*, 106 N. C. 494; 19 Am. St. Rep. 540, and extended note 543-547; *Shores v. Brooks*, 81 Ga. 468; 12 Am. St. Rep. 332. The owner of land may expel, with reasonable force, a wrongful occupant, without being liable to any civil action, although he may be liable for breach of the peace or forcible entry: *Souter v. Codman*, 14 R. I. 119; 51 Am. Rep. 364, and note 366-368. The owner of land has the right to enter peaceably upon it as against an occupant having no title or right to possession: *Roberts v. Preston*, 106 N. C. 411.

PATENTS, CONSTRUCTION OF. — Patents are subject to the same rules of construction as apply to conveyances between individuals: *Moore v. Smau*, 17 Cal. 199; 79 Am. Dec. 122; and in determining what land is embraced within the calls of a patent, reference may be had to the surveyor's field-notes and the original plat: *Alexander v. Lively*, 5 T. B. Mon. 159; 17 Am. Dec. 50; *Sheppard v. Wilnott*, 79 Wis. 15.

HAY v. WEBER.

[79 WISCONSIN, 527.]

PUBLIC STREET, BAY-WINDOWS PROJECTING INTO. — The owner of a lot fronting on a public street cannot maintain an action against another lot-owner to prevent the latter from constructing bay-windows projecting into such street, though such windows may prevent persons on a portion of the sidewalk from seeing the front of the plaintiff's store, and persons in his store from seeing other stores on the same side of the street.

ACTION for an injunction. Plaintiff was the owner of lot 5 in block 2, fronting on Main Street, in the city of Oshkosh, and had thereon a two-story brick building flush with the west line of the street. Adjoining plaintiff's lot on the north was lot 4, of which defendant was the owner, and on which he had erected a two-story brick building, the lower part of which was divided into three stores, and was also flush with the west line of the street. In front of one of the stores the defendant commenced the construction of two projecting bay-windows, which, when constructed, would project into the street about eighteen inches, and the plaintiff instituted this action with a view to enjoining the construction and mainte-

nance of such windows, claiming that they would obstruct the view of the plaintiff from his store, and would shut off the view from his store, and would thereby lessen the value of his property, and be an irreparable damage to him. A preliminary injunction, issued at an earlier stage of the proceedings, was continued in force and effect by the final judgment, and from such judgment the defendant appealed.

Finch and Barber, and F. Beglinger, for the appellant.

Weisbrod, Thompson, and Harshaw, for the respondent.

CASSODAY, J. Under the settled law of this state, the defendant's ownership of the fee to lot 4, mentioned in the foregoing statement, extended to the center of Main Street. Such title, however, was subject and subordinate to the right of the public to use the street for the ordinary purposes of travel. In other words, the primary object of a public street or sidewalk in a city is for public travel: *Jochem v. Robinson*, 66 Wis. 641; 57 Am. Rep. 298. It is not to be inferred from this, however, that even the public have the right to require the municipality or the abutting lot-owner to keep the entire space within the boundaries of a street open, free, and safe for travel, but only such portions as have been used by the public for travel: *Fitzgerald v. Berlin*, 64 Wis. 203. When the defect or obstruction complained of is wholly outside of such portion so used by the public for travel, and not connected therewith so as to endanger the safety of such travel, there can be no recovery, notwithstanding the same was within the boundary lines of such street: *Fitzgerald v. Berlin*, 64 Wis. 203; Elliott on Roads and Streets, 455. It is undoubtedly true, as suggested by the learned authors cited, that cities have a wide discretion in determining how much of a highway shall be devoted to the use of horses and vehicles, and how much shall be given to the sidewalks, trees, gutters, and the like: Elliott on Roads and Streets, 456. Such use is ordinarily regulated by municipal ordinances, as it is conceded was done in Oshkosh. When such use is so regulated, and the abutting owner uses the same in accordance with such regulations, he is not, in the absence of negligence, liable for accidents resulting from such use; and in such case the burden of proof is not upon him to show the necessity of such use: *Denby v. Willer*, 59 Wis. 240. This court has held that an abutting lot-owner may construct vaults or other areas under the sidewalk, with openings in the walk, if this is done in such a man-

ner as not to interfere with or endanger public travel: *Papworth v. Milwaukee*, 64 Wis. 389. The same rule has been applied by other courts to a structure over a right of way: *Sutton v. Groll*, 42 N. J. Eq. 213; *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100; *Gerrish v. Shattuck*, 132 Mass. 235.

In the case at bar it is not the public, nor a traveler, nor the municipality that is complaining of the structure in question, but an adjoining lot-owner abutting upon the same street. True, the complaint alleges that such bay-windows would obstruct travel upon the sidewalk, but it appears from the affidavits, and is very obvious, that they would not unreasonably obstruct such travel. Besides, that question is not here involved. The plaintiff makes no complaint of any injury sustained as a traveler. This being so, he is in no position to vicariously redress such public wrongs by private action. We have recently held that, to maintain a private action for a public nuisance, the injury sustained by the plaintiff must be such as not merely differs in degree, but in kind, from that which is sustained by the public: *Zettel v. West Bend*, 79 Wis. 316; *ante*, p. 715. The reasons for the rule, and the authorities in support of it, are there sufficiently stated. The bay-windows in question were only to extend out from the defendant's building a distance of eighteen inches. They could in no way prevent access to the plaintiff's store. They might prevent persons near the buildings on the sidewalk north of them from seeing the front of his store, or persons at his store from seeing the stores north of the bay-windows on the same side. It is claimed that such obstruction of vision interfered with and damaged the plaintiff's business. It is difficult to perceive how such obstruction could result in such damage, but assuming that it would, yet such damage would be too remote and speculative to constitute the basis of a private action at law or in equity.

The COURT. The order of the circuit court is reversed, and the cause is remanded, with direction to dissolve the injunction, and for further proceedings according to law.

INJUNCTION, WHEN WILL NOT ISSUE. — The owner of a lot fronting on a public street cannot maintain an action to restrain the adjoining lot-owner from maintaining a wooden awning in front of the latter's premises: *Hawkins v. Sanders*, cited in note to *State v. Berdella*, 38 Am. Rep. 128. An injunction will not lie to restrain one from making reasonable improvements on his own land, with reasonable care and skill, on the ground of damage to complainant's edifice, if the latter is not entitled to special protection,

either by prescription, or by grant from one making the improvement: *Lassala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *Guest v. Reynolds*, 68 Ill. 478; 18 Am. Rep. 570; *Gallagher v. Dodge*, 48 Conn. 387; 40 Am. Rep. 182. In *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748, it is decided that the owner of land may maintain an action against the adjoining owner for erecting a bay-window so as to extend over the plaintiff's land, even though the portion of the land covered by such bay-window has been laid out and is used as a highway. In *Burnham v. Nevins*, 144 Mass. 88, 59 Am. Rep. 61, the court decided that where city lots are conveyed with the reservation of a passage-way five feet wide in the rear, with no outlet at one end, for the purposes of access to the main street, the rights of abutters on the passageway are not infringed by the erection of bay-windows projecting over it from thirteen to eighteen inches, not interfering with foot-passage.

McDONALD v. STATE

[79 WISCONSIN, 651.]

CONSTITUTIONAL LAW — TWICE IN JEOPARDY. — A statute declaring that "whenever any judgment in a criminal action shall be removed by writ of error to the supreme court, and such court shall reverse said judgment because of any defect, illegality, or irregularity in the proceedings in such case subsequent to the rendition of the verdict of the jury therein, it shall be competent for the supreme court either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment," is not unconstitutional, as authorizing the accused to be twice put in jeopardy for the same offense.

CRIMINAL LAW. — JEOPARDY is the situation of a prisoner when a trial jury is impaneled and sworn to try the case upon a valid indictment or information, and such jury has been charged with his deliverance. To put him twice in jeopardy, he must again be put upon his trial, before a jury impaneled and sworn, and charged with his deliverance.

CRIMINAL LAW — TWICE IN JEOPARDY. — Re-sentencing a prisoner on the same verdict is not putting him twice in jeopardy for the same offense.

Rublee A. Cole, for plaintiffs in error.

Attorney-General and J. M. Clancey, assistant attorney-general, for defendant in error.

ORTON, J. The two plaintiffs in error, Samuel McDonald and John Graham, were tried together as defendants on an information for assault and robbery, and stealing from the person, being armed, under section 4375 of the Revised Statutes, and the jury having found them both guilty, the court sentenced the said Samuel McDonald to be imprisoned in the state prison at Waupun fourteen years, and the said John Graham to be imprisoned in said prison thirteen years. The case of each of said plaintiffs in error has been brought to

this court by writ of error, and the sentence only is assigned as error; it being in excess of the punishment provided for such offense. The error is apparent. The statute above cited provides only for imprisonment in the state prison of not more than ten years, nor less than three years.

The learned counsel of the plaintiffs in error demands in their behalf that upon the reversal of said judgments for such error, they be discharged from custody and go hence. To this end the learned counsel contends that section 2412 of the Revised Statutes, requiring the prisoners in such case to be resented by this court, or by the circuit court, for the term of imprisonment fixed by the statute is unconstitutional and void, as authorizing the plaintiffs in error to be twice put in jeopardy for the same offense. That statute provides that "whenever any judgment in a criminal action shall be removed by writ of error to the supreme court, and such court shall reverse said judgment because of any defect, illegality, or irregularity in the proceedings in such case subsequent to the rendition of the verdict of the jury therein, it shall be competent for the supreme court either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment."

The pronouncing of the proper judgment in this case by this court, or by the court below, upon the reversal of the former judgment, is not putting the defendants the second time in jeopardy for the same offense. "Jeopardy" "is the situation of a prisoner when a trial jury is impaneled and sworn to try his case upon a valid indictment (or information), and such jury has been charged with his deliverance": Bouvier's Law Dict. The following cases are cited to this definition: *State v. McKee*, 1 Bail. 655; 21 Am. Dec. 499; *Weinzorpflin v. State*, 7 Blackf. 191; *Commonwealth v. Jenks*, 1 Gray, 491; *State v. Burke*, 38 Me. 574; *Commonwealth v. Cook*, 8 Serg. & R. 586; 9 Am. Dec. 465; *McFadden v. Commonwealth*, 23 Pa. St. 12; 62 Am. Dec. 308; *State v. Roe*, 12 Vt. 93; 1 Bishop's Crim. Law, sec. 660; *People v. Goodwin*, 18 Johns. 206; 9 Am. Dec. 203; *United States v. Gibert*, 2 Sum. 60; *United States v. Haskell*, 4 Wash. C. C. 402. The accused must be put on trial, and the jury impaneled and sworn, to place him in jeopardy. To put him twice in jeopardy, he must be again put upon his trial, before a jury impaneled and sworn, and charged with his deliverance: *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; 6 Am. St. Rep. 757; *Hilands v. Commonwealth*,

111 Pa. St. 1; 56 Am. Rep. 235; *State v. Parker*, 66 Iowa, 586; *Whitmore v. State*, 48 Ark. 271; *Adams v. State*, 99 Ind. 244. Such is the import of all the cases in this country that I have been able to find. I do not think that any court has ever held that resentencing a prisoner on the same verdict is putting him in jeopardy twice for the same offense; for it would be contrary to the legal signification of the term, and in violation of its accepted sense and meaning.

The learned counsel presented an able argument, and cited many cases to show that the said statute is unconstitutional for this reason, but not one of the cases had any bearing on the question. They were cases in which it is held that the court had no power, authority, or jurisdiction to pronounce the proper judgment after a reversal of an illegal judgment, and it was because there was no statute that authorized it. In other states where such a statute exists the question has never been raised, so far as it is known to us.

So far the plaintiffs in error have not suffered any injury, for the former judgment was lawful for the term of ten years, and the excess of time beyond that only is illegal; and they will not, if the proper judgment is entered *nunc pro tunc*, as it should be.

The COURT. The judgment of the circuit court in each of the above cases is reversed, and each cause is remanded, and the record thereof remitted, in order that the said circuit court may in each of said cases pronounce and enter the proper judgment *nunc pro tunc*. The warden of the state prison will surrender the plaintiffs in error to the sheriff of the county of Ashland, who will hold them in custody until discharged, or their custody changed by due course of law.

CRIMINAL LAW — FORMER JEOPARDY. — An accused is not put twice in jeopardy by having his case remanded for a new trial on account of errors occurring at the trial: *Younger v. State*, 2 W. Va. 579; 98 Am. Dec. 791, and note; *Sutcliffe v. State*, 10 Ohio, 469; 51 Am. Dec. 459, and note; *Gannon v. People*, 127 Ill. 50; 11 Am. St. Rep. 147, and note.

CRIMINAL LAW — WHAT CONSTITUTES FORMER JEOPARDY. — An accused is in jeopardy when he is regularly charged with crime before a tribunal properly organized and competent to try him: *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109; 6 Am. St. Rep. 757, and note. See extended note to *State v. McKee*, 21 Am. Dec. 505-508; *Ellis v. State*, 25 Fla. 702; *Ex parte Fenton*, 77 Cal. 183.

BROWNELL v. DURKEE.

[79 WISCONSIN, 653.]

ATTACHMENT LEVIED ON PROPERTY OF STRANGER — RIGHT OF THE LATTER TO RETAKE AND RETAIN POSSESSION. — If, after a writ has been levied on the property of a stranger thereto, he quietly and peaceably repossesses himself of it, he may retain it; and the officer who levied the writ is not justified in using forcible means to regain possession, and if he does so, is liable to an action. Should he wish to test the right of the owner, his remedy is to bring an action for that purpose.

Fethers, Jeffris, and Fifield, for the appellant.

John B. Simmons and Charles S. French, for the respondents.

COLE, C. J. This is an action brought to recover damages for the wrong of the defendants in assaulting the plaintiff on or about the 15th of December, 1885, and forcibly ejecting him from a railroad car while he was unloading coal that belonged to him. The defendants justify their acts by answering that, at the time, the defendant Harris R. Durkee was a constable, and had a writ of attachment in favor of the other two defendants against one Price and one Paul, and that he levied on the coal in the car mentioned as the property of Price and Paul in good faith and without malice, and exercised only so much force as was necessary for the purpose of ejecting the plaintiff from the car where the coal was.

It appears that the plaintiff, shortly before the 15th of December, ordered a car of coal, which he expected to sell to Price. The car arrived at Geneva, consigned to him. Price paid the freight on the coal, but did not pay for the coal, and it was not delivered to him by the plaintiff. The attachment was levied on the coal in the car, while the car was standing on the side-track of the company at Geneva, on the 15th of December, as the property of the defendants in the attachment. The railroad agent was informed of the attachment, and was asked by the constable to seal the car up and let it stand where it was for him, temporarily. The next day the plaintiff notified the defendants that Price did not own the coal, but that it belonged to him. On the morning of the 17th of December the plaintiff went to the freight depot, saw the agent about the coal, and the agent formally opened and delivered the car of coal to him. The plaintiff thus took quiet and peaceable possession of the car, and was engaged in removing the coal therefrom, when the constable arrived on the

ground, forbade him from interfering with the coal, and demanded possession of the car. This being refused, he forcibly ejected the plaintiff from the same, which is the wrong complained of. These material facts are clearly established by the evidence, and are really not disputed.

The possession of the coal, after the seizure of the attachment, must be deemed to have been constructively in the constable, as he had left the car, with its contents, where he found it, though in charge of the railroad company. But he had taken as complete possession of the coal as was practicable, unless he removed it from the car. The constable had such possession and special interest in the coal by virtue of his levy that he could have maintained an action against any one who interfered with it, had the coal been the property of the defendants in the attachment. It seems to us there can be no doubt as to the correctness of this proposition. But the coal belonged to the plaintiff. It had been ordered by him, and was consigned to him, and was afterwards adjudged to be his property in an action brought to recover the value thereof. But after the seizure, as we have said, he acquired peaceable possession of the coal, and held such possession when the constable deprived him of it in a forcible manner.

The important question in the case is as to the justification of the officer. The other defendants were present at the time, aiding and abetting him in the execution of the writ. The learned counsel for the defendants argues and insists that, as the officer was required by his writ to levy upon the coal, the title to which was in dispute or in doubt, and he being indemnified therefor, he was in duty bound to make the levy and hold the property until the question of title was settled or the property otherwise released; and that an officer while so acting may not be lawfully interfered with or resisted by the rightful owner, whether such owner be the defendant in the attachment or not; but that the officer had the right to overcome such resistance and keep or regain possession by the use of such force as might be necessary for the purpose. The learned circuit court doubtless adopted this view of the law, as it directed a verdict for the defendants. The counsel for the plaintiff insists that the court erred in thus directing the verdict for the defendants, because, he says, it was a question of fact for the jury to determine whether the defendants were acting in good faith in seizing the coal as the

property of Price and Paul, and in taking it from the possession of the plaintiff; also whether the defendants used greater force than was necessary in ejecting the plaintiff from the car; and further, that under the undisputed testimony, the plaintiff was entitled to recover his actual damages for the wrongful act of the defendants in ejecting him from the car. We shall spend no time in considering the first two questions. As it is said by the opposing counsel, no claim was made on the trial that the evidence raised any doubts on these points, and there was no suggestion or request made that they should be submitted to the jury. The judgment must be reversed, for the reason which we will now proceed to state.

As we have said, the important question is, Was the officer justified or protected in forcibly taking possession of the coal as against the plaintiff, who was the real owner? The counsel for the plaintiff contends he was not so justified or protected. He says, notwithstanding the absolute right of the officer to proceed and execute the writ, still, if he takes the property of the plaintiff on a process against Price and Paul, he is none the less a trespasser upon the rights of the plaintiff, and if a trespasser, he acquired no property in the thing attached as against the real owner. The plaintiff, he says, may have his action and recover the value of the property taken, as was done in this case; or if, after the seizure on the attachment, the plaintiff can peaceably obtain the possession of the attached property, he may take it, and thus subject himself to an action at the suit of the officer; but that the officer has no right in law to dispossess the owner by using force for that purpose, and is not protected in doing so. These different positions of counsel as to the duty and liability of an officer attaching property, though diametrically opposed, are sustained by high authority. There is a serious conflict of judicial opinion on the subject, and we have to make a choice to some extent between the rules laid down in opposing decisions. The courts of Vermont, New Hampshire, and Ohio support the contention of the defendants, while those in Massachusetts, New York, and Illinois sustain the plaintiff's position: See *State v. Downer*, 8 Vt. 424; 30 Am. Dec. 482; *State v. Buchanan*, 17 Vt. 573; *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208; 75 Am. Dec. 173; *Faris v. State*, 3 Ohio St. 159. *Contra*, *Commonwealth v. Kennard*, 8

Pick. 133; *Elder v. Morrison*, 10 Wend. 128; 25 Am. Dec. 548; *Wentworth v. People*, 5 Ill. 550.

But the rule which commends itself to our judgment as the most salutary and reasonable is to hold that if, after seizure on attachment against a third party, the rightful owner can quietly and peaceably obtain possession of the property, he may retain such possession, and the officer will not be justified in using forcible means to regain possession. If the officer wishes to test the right of the owner, he should bring an action for that purpose.

The courts which adopt the Vermont rule think there are strong grounds of public policy, where the question of property is doubtful, that the owner should resort to his remedy at law to settle the question in the courts. There is, doubtless, force in this consideration. Parties should not be permitted to resort to force to vindicate their rights where peaceable remedies exist. But the question can be as well determined in an action brought by the officer as when it is brought by the owner. The courts all admit that due regard should be had to the rights which the owner has to his property, and that these rights should be protected and secured as far as possible. Now, why should the owner then, when he has possession of that which is his own, be required to give it up to an officer who comes with a process, not against him, but against a third party with whom he has no connection, and demands possession? See *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219.

We can perceive no sufficient reason, either founded in law or on public policy, for holding that the owner of personal property may not insist upon his rights, and refuse to surrender the same to an officer, because the latter has attached it on a writ against a third party. The creditor or officer is not without legal redress to test the question of title to the property. It is admitted that the officer is a trespasser if he seizes property not belonging to the defendant in the attachment. Why should his unlawful act be regarded with more favor than the rights of the real owner? True, it is said the owner of property seized or attached on a process against another has legal remedies by an action, and therefore he ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and the creditor may fail to collect his debt. But, as we have said, the officer after a levy may bring

an action against any one who interferes with his possession, and thus settle all rights of property: See *Merritt v. Miller*, 13 Vt. 416. There is no hardship in this rule. It is surely unnecessary to allow the officer to resort to force and violence to regain possession of attached property, where the law affords him an adequate legal remedy to enforce his rights. To allow him to use force under such circumstances is certainly not essential for the protection of the officer, nor to vindicate the authority of the law. But the question is so fully considered and discussed in the cases to which we have referred, that no further remarks upon the subject are called for.

We think the circuit court erred in directing a verdict for the defendants, and that the judgment of the circuit court must be reversed and a new trial ordered.

The COURT. It is so ordered.

TRESPASS — WRONGFUL LEVY. — An officer making a wrongful levy is a trespasser: *Forsythe v. Ellis*, 4 J. J. Marsh. 298; 20 Am. Dec. 218; *Holton v. Taylor*, 80 Ga. 508; *Dixon v. White etc. Co.*, 128 Pa. St. 397.

LEVY BY OFFICER MADE UPON PROPERTY OF A THIRD PERSON. — As to the rights and remedies of one whose property has been levied upon by an officer under a writ issued against another person, see *State v. Richardson*, 38 N. H. 208; 75 Am. Dec. 173, and particularly note 176-182. Compare *People v. Clements*, 68 Mich. 655; 13 Am. St. Rep. 372, and note.

she was complaining, as having been produced by an injury, without reference to its cause or manner of occurrence. The court did not err in refusing to exclude the testimony: 1 Wharton on Evidence, sec. 263.

2. It is undoubtedly the rule of practice in this state, too well and long settled to be departed from, that in examining into the character of a witness sought to be impeached, the inquiry is not limited to character for truth and veracity, but may extend to his general moral character. Notwithstanding such extension of the rule, immoral conduct in any one particular, however it may bear on the question of general character, cannot be put in evidence for this purpose. By a notorious want of chastity, a female will certainly obtain a bad character, and her general reputation, if she has acquired any, may be given in evidence to impeach her, but not the particular and independent fact that she is a prostitute, or keeps a house of ill-fame. The cause producing her bad character cannot be inquired into, unless on cross-examination: *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595; *Motes v. Bates*, 80 Ala. 387. The evidence as to the character of the house kept by the witness sought to be discredited, and as to the orders of the municipal authorities in reference to her, was properly excluded.

3. The first charge requested by defendant is argumentative. We have repeatedly declared that mere arguments on specific parts of the evidence, which may be properly addressed to the jury, should not be formulated into legal propositions, and announced to them as such. There is no error in refusing charges of this character: *Hussey v. State*, 86 Ala. 34; *Hawes v. State*, 88 Ala. 37.

4. That a party suing for damages for an injury caused by the negligence of another has on him the burden to prove such negligence, and that it was the proximate cause of the injury, is an elementary principle. Necessity has modified the rule in the case of a passenger on a railway train, but not to the extent of entire exemption from the necessity to make a *prima facie* case of negligence. Proof of mere injury, without more, does not raise a presumption of negligence sufficient to impose on the company the burden to prove due care on its part. In order to recover, it is incumbent on plaintiff to show an accident from which the injury resulted, or circumstances of such character as impute negligence. Railway companies are bound to exercise a high degree of care in pro-

viding tracks and plants, locomotives and cars, competent and skillful employees, and all other agencies and appliances required in the safe transportation of passengers and freight. When it is shown that an accident happens which would not ordinarily have happened if due care and foresight had been exercised,—such as from the derailment of the train, or defect of the track or machinery, or from a collision, or from the breakage or defective condition of any of the appliances employed in the business, or the method of their use,—negligence may be presumed or inferred; proof of an accident of such nature or under such circumstances establishes a *prima facie* case of negligence: *Delaware etc. R. R. Co. v. Napheys*, 1 Am. & Eng. R. R. Cas. 52–59, note; 2 Wood's Railroad Law, 1096, note; 1 Wharton on Evidence, sec. 359. The rule is clearly and comprehensively stated in *Western Transportation Co. v. Downer*, 11 Wall. 129, by Field, J.: "A presumption of negligence from the simple occurrence of an accident seldom arises, except when the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management and construction of which he is responsible."

The injury occurred on a street-car drawn by horses. When plaintiff proved that, on the stoppage of the car, she at once walked out on the platform to get off, and while in the act of alighting, the driver suddenly started the car with a jerk, which caused her to fall, whereby she was injured, she established a *prima facie* case of negligence in the management of the car; the burden of proof, which primarily rested on her was uplifted, and the burden of disproof thrown on defendant. She was not required to make, in the first instance, other and further proof that the car did not stop long enough to enable her to get off with safety. On the case made by the evidence, negligence *vel non* became a question of inquiry by the jury on the entire testimony: *Georgia Pac. R'y Co. v. Hughes*, 87 Ala. 610.

When the evidence is in equipoise, the verdict must be against the party on whom the burden of proof primarily rested; but in a civil case, a verdict may be based upon a preponderance of the evidence, if such preponderance is sufficient to satisfy the minds of the jury: *Vandeventer v. Ford*,

60 Ala. 610. It can seldom be said that the issue is not in uncertainty to some degree whenever there is a conflict of evidence. The latter clause of the charge requested by defendant, to the effect that if all the testimony in the case left the jury in uncertainty as to whether the plaintiff was injured by the carelessness of defendant's driver they must find for the defendant, lays down the rule too exactly; the jury would probably have understood from the instruction that they must be clearly convinced. The fourth and fifth charges asked by defendant, as framed, were calculated to mislead the jury as to the measure of proof: *Wilkinson v. Searcy*, 76 Ala. 176; *Lehman v. Kelly*, 68 Ala. 192.

Affirmed.

EVIDENCE — STATEMENTS TO PHYSICIANS. — In actions to recover for personal injuries, the rule seems to be, that a physician who attended the plaintiff cannot testify as to any statements made to him in his professional capacity regarding the plaintiff's injuries and condition, nor with reference to the cause or manner of receiving such injuries: *Pennsylvania Co. v. Marion*, 123 Ind. 415; 18 Am. St. Rep. 330; note to *Thompson v. Ish*, 17 Am. St. Rep. 565-569; *Briesenmeister v. Supreme Lodge*, 81 Mich. 525; *Oooley v. Foltz*, 85 Mich. 47. But whenever it is apparent that an admission or statement was made or information given by a patient to his physician, he may testify as to such declaration or information, if it was not necessary to enable him to prescribe as a physician or act as a surgeon: Note to *Thompson v. Ish*, 17 Am. St. Rep. 568, 569. Where a physician who has treated a patient for injuries is made a witness, he may testify how such patient described the pain from which he was suffering, and may also state the actions of the patient which caused him to learn of the patient's condition: *Ashton v. Cuy R'y Co.*, 78 Mich. 587. A physician, having examined an injured person, may testify as to the character of the broken limb: *Goshen v. England*, 119 Ind. 369; or he may give his opinion of the condition of the party, even though such opinion is based partly upon the statements of the patient himself, describing his sufferings: *Jones v. Chicago etc. R'y Co.*, 43 Minn. 279.

WITNESS, IMPEACHMENT OF — CHARACTER. — For the rules which must govern in the impeachment of witnesses on the ground of character or reputation, see note to *Allen v. State*, 73 Am. Dec. 771-775; *Benesch v. Wagner*, 12 Col. 534; 13 Am. St. Rep. 254, and note. It is error to rule that a witness, who is being examined for the purpose of impeaching another witness, can only testify as to what he personally knows of such witness's reputation, and not what people generally say about him: *People v. Webster*, 89 Cal. 572; for the general reputation of a person among his neighbors is the proper subject of inquiry in such cases: *Waddingham v. Hewlett*, 92 Mo. 528. The character of a witness cannot be impeached, however, by showing that his neighbors generally said he was guilty of some particular offense: *State v. Hawn*, 107 N. C. 810.

NEGLIGENCE — BURDEN OF PROOF. — The general rule is, the burden of proving negligence as alleged in a complaint is upon the plaintiff, as alleged in the answer, upon the defendant: *Murray v. Missouri P. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601, and note. But the occurrence of an accident to

a passenger is *prima facie* evidence of negligence on the part of the carrier, throwing upon it the *onus* of rebutting the presumption by proof that there was no negligence: *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and note discussing accidents as evidence of negligence. See also, to the same effect, *Taylor etc. R'y Co. v. Taylor*, 79 Tex. 184; 23 Am. St. Rep. 316; *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781; *Gulf etc. R'y Co. v. Smith*, 74 Tex. 276; *Louisville etc. R'y Co. v. Taylor*, 126 Ind. 126; *Georgia P. R'y Co. v. Lowe*, 91 Ala. 432, *post*, p. 927.

KANSAS CITY, MEMPHIS, AND BIRMINGHAM RAILROAD COMPANY v. SMITH.

[90 ALABAMA, 28.]

EVIDENCE — ADMISSIBILITY OF PHOTOGRAPH. — In an action to recover for a personal injury, a photograph of a trestle and a wrecked train of cars, taken about two hours after the accident occurred, and verified by the testimony of the photographer as being a correct representation of the locality and scene, is admissible in evidence, to aid the jury in properly understanding the case.

NEGLECT — EVIDENCE TO PROVE. — In an action to recover for personal injury received in a railroad accident, alleged to have been caused by the rotten condition of a trestle and by the overloading of an old and rotten car with guano, a witness who has handled such fertilizer for several years, and has testified to the weight of sacks, filled with it, may also testify to the dimensions of such sacks, as bearing on the question of negligence in overloading the car.

NEGLECT — WHEN A QUESTION FOR JURY. — When the complaint in an action is founded on negligence, and the evidence tends to sustain the allegations, the question of the negligence of defendant and of the contributory negligence of plaintiff is properly left to the jury.

ACTION to recover for personal injury sustained by plaintiff, J. W. Smith, while in discharge of his duties as brakeman on defendant's railroad. The accident was caused by a trestle giving way as a car loaded with guano struck it. The complaint alleged that the accident was caused by the rotten condition of the timbers of the trestle, and by the overloading of an old, rotten and worn-out car with guano. At the trial one Slaton, testifying for plaintiff, stated that he "had been trading in and handling guano for five years, and bought a good deal of it in car-load lots, and that the sacks of it were put up in 167 and 200 pounds, so as to make either ten or twelve sacks to the ton." He was then asked to state how long, how wide, and how thick such sacks were, and after stating their dimensions, the question was objected to, and the objection overruled. Judgment in favor of plaintiff for twelve thousand dollars. Defendant appealed. Other facts are stated in the opinion.

Hewitt, Walker, and Porter, for the appellant.

Bowman and Harsh, and G. R. Harsh, for the appellee.

SOMERVILLE, J. 1. The photograph of the trestle and of the wrecked train of cars was shown to have been taken about two hours after the accident occurred, and was verified by the testimony of the photographer as being a correct representation of the locality and scene. It was clearly admissible in evidence, to aid the jury in properly understanding the case.

It is a well-understood rule, applied in every-day practice in the courts, that diagrams and maps illustrating the scene of a transaction, and the relative location of objects, if proved to be correct, are admissible in evidence, in order to enable the jury to understand and apply the proved facts to the particular case: 3 Brickell's Digest, p. 431, sec. 366. A plan, picture, or other representation produced by the art of photography is admissible on like principles, if verified as a true and accurate representation. It is in fact but a scientific reproduction of a *fac-simile* of the original object in nature, by a mechanical art which is every day advancing towards perfection. The competency of such evidence was settled in *Luke v. Calhoun Co.*, 52 Ala. 115, approving a like ruling in the case of *Udderzook v. Commonwealth*, 76 Pa. St. 340, where a photograph of a person in life, shown to be a correct picture, was admitted in evidence, for the purpose of aiding in the identification of a deceased person alleged to have been murdered. The case of *Ruloff v. People*, 45 N. Y. 213, supports the same principle.

In the case of *Blair v. Pelham*, 118 Mass. 420, which was an action against a town to recover damages for injuries caused by a defect in a highway, the defendant was permitted to put in evidence a photograph of the place of the accident, on its verification by the photographer as a true representation. So in *Church v. City of Milwaukee*, 31 Wis. 512, an action for damages resulting to a lot-owner from a change in the grade of a street, a photograph of the premises, shown to be correct, was admitted, "to aid the jury in arriving at a clear and accurate idea of the situation of the premises, and enable them to better understand how they were affected by the change in the grade." And *Cozzens v. Higgins*, 33 How. Pr. 436, decided by the New York court of appeals, is to the same effect. In an action of trespass against an adjoining

proprietor for the wrongful act of opening holes in the walls of the plaintiff's cellar, so as to render it untenable, by projecting into it heavy beams, a "photographic view" of the cellar was admitted in evidence as "an appropriate aid to the jury in applying the evidence." The case of *Dyson v. New York etc. R. R. Co.*, 57 Conn. 10, 14 Am. St. Rep. 82, is another authority directly in point, where, in an action for damages against a railroad company, a photographic view of the *locus in quo* of the accident was held to be admissible in evidence. The same ruling precisely was made in the case of *Archer v. New York etc. R. R. Co.*, 106 N. Y. 589.

We entertain no doubt as to the soundness of these rulings, and they fully support the action of the court in admitting in evidence the photograph of the wrecked train and surrounding locality in this case: 1 Wharton on Evidence, 3d ed., sec. 676; *Eborn v. Zimpelman*, 26 Am. Rep. 319-321, note; *Marcy v. Barnes*, 16 Gray, 161; 77 Am. Dec. 405; *Locke v. Sioux City R. R. Co.*, 46 Iowa, 109.

2, 3. The question propounded to the same witness Slaton, and his answer to it, tended to throw some light on the plaintiff's contention that the car containing the fertilizer was too heavily loaded, which was one of the grounds of negligence imputed to the defendant as the proximate cause of the injury suffered by the plaintiff. This evidence was therefore relevant, and its admission free from error. The objection interposed, moreover, was general and undefined, failing to particularize any specified ground, and for this reason there was no error in disregarding it: *Dryer v. Lewis*, 57 Ala. 551; 3 Brickell's Digest, p. 443, sec. 567.

4. The evidence tended to sustain the allegations of each of the counts in the complaint — the first and the third — upon which the merits of the case were tried before the jury. And under the circumstances, we are of opinion that the questions of negligence by the defendant, and of contributory negligence by the plaintiff, were both properly left to the jury: *Louisville etc. R. R. Co. v. Perry*, 87 Ala. 392.

The objection taken to the panel of jurors was clearly without merit.

We discover no error in the record, and the judgment must be affirmed.

PHOTOGRAPHS — EVIDENCE. — Photographs are admissible in evidence, in actions for personal injuries, to show the locality and circumstances of the accident, the wreck, or anything which might tend to explain or indicate

the cause of the injury, provided the photographs were taken within a sufficient time after the occurrence: *Bedell v. Berkey*, 76 Mich. 435; 15 Am. St. Rep. 370; *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82; or to show the result of certain injuries upon the person of the injured party: *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 77; *Cowley v. People* 83 N. Y. 464; 38 Am. Rep. 464, and note. Upon the same principle, photographs of one alleged to have been murdered, or of the place where a murder is alleged to have been committed, are admissible in evidence in trials for murder: *Malachi v. State*, 89 Ala. 134; *Keyes v. State*, 122 Ind. 527; *People v. Fish*, 125 N. Y. 136; *Franklin v. State*, 69 Ga. 36; 47 Am. Rep. 748. But if the conditions have been altered prior to the taking of the photographs, they must not be admitted as evidence: *Verran v. Baird*, 150 Mass. 141. So in a contest of heirship, a photograph of the deceased taken many years before should be excluded: *In re Jessup*, 81 Cal. 408.

As to the admissibility of photographs as evidence, generally, see *Moran v. Zimpelman*, 47 Tex. 503; 26 Am. Rep. 315, and note 313-321; *Duffin v. People*, 107 Ill. 113; 47 Am. Rep. 431; *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894; *White Sewing-machine Co. v. Gordon*, 124 Ind. 495; 19 Am. St. Rep. 109; *Ayers v. Harris*, 77 Tex. 108; *Buward v. McNulty*, 77 Tex. 438; *Howard v. Russell*, 75 Tex. 171.

NEGLECTANCE, QUESTION FOR WHOM. — Negligence, as well as contributory negligence, is ordinarily a question of fact for the determination of the jury: Note to *Deane v. Wilmington etc. R. R. Co.*, 22 Am. St. Rep. 908, 909.

GEORGIA PACIFIC RAILWAY CO. v. UNDERWOOD.

[90 ALABAMA, 49.]

CONTRIBUTORY NEGLIGENCE — PROTRUDING ARM FROM WINDOW OF CAR. —

It is negligence *per se*, to be declared by the court as matter of law, for a passenger on a steam-railway to protrude his arm, hand, or elbow through or beyond the outer edge of the window or surface of the car while the latter is in motion, and no recovery can be had for an injury which is proximately caused by such negligence.

RAILROADS — LIABILITY FOR NEGLIGENCE OF THIRD PARTY USING THE CARS.

— A railroad company permitting a third party to use its cars on its spur-track is liable for his negligence in leaving such cars so near the main track as to cause a collision.

ACTION to recover for personal injuries suffered by plaintiff, Underwood, while a passenger on defendant's railroad. It appeared that at the place of the accident there was a spur-track owned by defendant, and that loaded cars on this track were standing so near the main track as to scrape the side of the car in which plaintiff was a passenger. His arm was resting on the edge of the open window, and was thus struck and fractured. The spur-track was built on defendant's right of way, and the cars thereon belonged to it, but were used by a third party in transporting coal. These cars were pushed

by defendant's employees from the main track to the spur, where the third party's servants took charge of them, and pushed them to the place where they were loaded. These loaded cars had been pushed so near the main track by the third party's servants as to cause the collision and accident as stated. The court charged that the negligence of the servants of such third party in leaving the loaded cars in dangerous proximity to the main track was imputable to defendant. Judgment in favor of plaintiff for two thousand five hundred dollars, and defendant appealed.

James Weatherly, for the appellant.

Smith and Lince, for the appellee.

MCCLELLAN, J. The following authorities hold that it is negligence *per se*, and to be so declared by the courts as a matter of law, for a passenger on a steam-railway to protrude his arm, hand, or elbow through the window of a car while in motion, and beyond the outer edge of the window or outer surface of the car, and that a recovery cannot be had for any injury which, but for such negligence, would not have been sustained: *Dun v. Seaboard etc. R. R. Co.*, 78 Va. 645; 49 Am. Dec. 388; *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush, 535; *Louisville etc. R. R. Co. v. Sicking*, 5 Bush, 1; 96 Am. Dec. 320; *Barton v. St. Louis etc. R. R. Co.*, 52 Mo. 253; 14 Am. Rep. 418; *Indianapolis R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Pittsburgh etc. R. R. Co. v. Andrews*, 39 Md. 329; 17 Am. Rep. 568; *Todd v. Old Colony etc. R. R. Co.*, 8 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; 83 Am. Dec. 679; *Holbrook v. Utica etc. R. R. Co.*, 12 N. Y. 236, 244; 64 Am. Dec. 502.

Against this array of adjudged cases, and to the converse of the proposition stated, there is believed to be in reality but one authority. That is the case of *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758, which takes the position, and supports it with vigor, that it is not negligence *per se* for a passenger to project his arm out of the window of the car in which he is riding. Another case frequently cited and relied on to support this view is that of *Chicago etc. R. R. Co. v. Pondrom*, 51 Ill. 333. The conclusion in that case, however, was rested on the doctrine of comparative negligence,—a doctrine which, if not peculiar to Illinois, certainly is not recognized in our jurisprudence,—and while the protrusion of the passenger's arm from the window of a moving car was

admitted to be negligence, the judgment was allowed to stand, because plaintiff's negligence was held to be less than that of the defendant. In the case of *Guin v. South Carolina R'y Co.*, 29 S. C. 381, the ruling of the supreme court of South Carolina, that the inquiry of negligence *vel non* in projecting the arm from the car window was for the jury, proceeded, it seems, from a construction of the constitution of that state, under which, and not from a consideration of general principles of law, the court felt impelled to submit the whole question of contributory negligence to the jury. A like conclusion was reached in Louisiana with respect to a passenger on a street-railway: *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139; 44 Am. Rep. 419. But as Mr. Bishop observes: "Steam-power is more difficult of control than horse-power; so the same negligent act of the passenger, such as voluntarily and unnecessarily riding on the platform of the car, is regarded as somewhat more recriminatory in the former than in the latter": Bishop's Non-Contract Law, sec. 1116. And the whole doctrine of this case, as also the Wisconsin case, *supra*, is repudiated by Mr. Wood, in the following language: "But the line of reasoning adopted in this case fails to convince us that the doctrine held is either just or proper. Any person possessed of sufficient intelligence to ride upon a street-car must know that the vehicle in which he is riding cannot turn from the rails upon which it runs, and is constantly passing other vehicles which are liable to pass very near to it, so as to render it unsafe, except with the utmost watchfulness on his part, to allow any portion of his body to protrude beyond the outer surface of the car; and it makes no difference in this respect that one source of danger is the company's own car passing upon other rails laid in the street. . . . To say that a passenger may be stupidly negligent, and expose his person to danger upon this class of vehicles, and the company made liable for the consequences of his negligence, is the assertion of a rule which has no foundation in reason, and but little in authority; and it seems to us that the rule generally adopted, that such acts upon the part of a passenger, either upon a street or steam car are *prima facie* negligent, is the correct one": 2 Wood's Railroad Law, 1107, 1108.

The doctrine of the authorities cited first above is similarly approved by other text-writers of recognized accuracy and learning. Thus it is said in 2 Shearman and Redfield on Negligence, sec. 519, that "it is deemed contributory negli-

gence, within the rule, for a passenger to do any voluntary act which unnecessarily exposes him to risk of such injuries as a traveler is liable to. A passenger cannot therefore recover (as a general rule) for an injury to his arm or head while improperly projecting out of a window of a railroad car or stage." And Mr. Beach states the doctrine as formulated in *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294, to the effect that, as a "general rule, a passenger who puts his head or elbow or any other part of his body out of the window of the car in which he is riding has no cause of action against the railroad company for any injury that he may sustain on that account from contact with outside obstacles or forces. If any part of the passenger's body extends through the open window, beyond the place where the sash would be when the window is shut, it is sufficient to prevent a recovery of damages by him." And with respect to the contrary position taken by the supreme court of Wisconsin, he observes: "A consideration of the cases to be cited in support of this view will show that there is but a slight basis for it, and that the weight of authority is decidedly against any such position": Beach on Contributory Negligence, 164, 166, 167. Bishop recognizes the same doctrine: Bishop's Non-Contract Law, sec. 1107; and Mr. Wharton, while expressing the same doubts as to the correctness of the rule to the extent it has gone, yet, in effect, admits that it has the support of the weight of authority: Wharton on Negligence, sec. 361.

This question is an open one in Alabama. We are, however, satisfied with the rule as formulated and supported by the great number of adjudged cases and the texts to which we have referred. The reasons upon which they base the doctrine appear to be eminently sound. Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation. No possible necessity of the passenger can be subserved by the protusion of his person through them. Neither his convenience nor comfort requires that he should do so. It may be, doubtless is, true that men of ordinary prudence and care habitually lean upon or rest their arms upon the sills or windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills, and beyond the surface of the car. We cannot concur in the assumption of the Wisconsin court that pru-

dent men are habitually given to thus projecting themselves from the windows of moving trains. Judge Thompson, who evinces an inclination to agree with that court, fails to indorse this assumption as to the habits of prudent men, which is the key-stone to the position announced by it. He says: "It is perhaps not too strong a statement, that no person ever traveled on a railway train without at some time resting his arm on the window-sill at least, if not permitting it to protrude slightly. Conduct which is universal is necessarily that of persons reasonably prudent": Thompson on Carriers, 258. But the conduct which is assumed by him to be universal is that of resting the arm on the sill, not permitting it to protrude even slightly beyond. The former, prudent men may do; but we cannot conceive that the latter is an act which a man of reasonable care and prudence would ever voluntarily do, much less that it is the habit of such men to so act. The former, under ordinary circumstances, is not negligence. The latter, according to the overwhelming preponderance of authority, based on sound reason as we conceive, standing by itself, is always negligence *per se*, which will defeat a recovery for any injury to which it proximately contributed.

The action of the trial court as to charges given and refused was not in harmony with our views of the law on this point. The jury should have been instructed, in substance, to return a verdict for the defendant, if they should find from the evidence that, at the time of the accident, plaintiff's arm or elbow was protruding through the window, and beyond the outer surface of the car, and but for this fact the injury would not have been suffered.

The rulings of the trial court as to defendant's liability for the negligence of Moore and Wells, or their employees, in leaving the car on the spur-track in dangerous proximity to the main line were free from error: *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 1; 69 Am. Dec. 820; *Ricketts v. Birmingham Street R'y Co.*, 85 Ala. 600; *Montgomery Gas Light Co. v. Montgomery etc. R'y Co.*, 86 Ala. 873.

For the error pointed out above, the judgment is reversed and the cause remanded.

RAILROAD COMPANIES — CONTRIBUTORY NEGLIGENCE — PROTRUDING ELBOW. — A passenger on a railroad car, who rides with his elbow out of the window, is guilty of such negligence as will preclude his maintaining an action for injuries: *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18; 80 Am.

Dec. 49, and note. See *Moulter v. Willamette etc. Ry Co.*, 18 Or. 189; 17 Am. St. Rep. 717, and note.

So a passenger has been adjudged guilty of contributory negligence precluding redress, when injured while standing on the rear platform of a freight train without holding to anything: *Malcom v. Richmond etc. R. R. Co.*, 106 N. C. 63; or when, after having mounted a moving car, he remained on the steps, and was struck by a standing post, with the position of which he was familiar: *Aiken v. Frankford etc. R. R. Co.*, 142 Pa. St. 47; or when he was in the baggage-car, where, by the rules of the company, passengers are not permitted to be: *Jones v. Chicago etc. Ry Co.*, 43 Minn. 279; or when standing on the front platform of a street-car, in a dangerous position, contrary to the rules of the railway company: *Baltimore etc. Road v. Carson*, 72 Md. 371.

BIRMINGHAM UNION RAILWAY COMPANY v. SMITH.

[90 ALABAMA, 60.]

RAILROADS — NEGLIGENCE IN STARTING STEAM-CAR. — Steam-cars stopping at regular stations are only required to halt a sufficient time to allow passengers to alight by the exercise of ordinary diligence on their part; and the conductor in charge, having waited a reasonable time, is not negligent in starting the train while a passenger is in the act of alighting, or is in a dangerous position, unless, in the exercise of reasonable care, he knows, or ought to know, of such danger to the passenger.

RAILROADS — NEGLIGENCE IN STARTING HORSE-CAR. — The driver of a horse-car, when signaled to stop, must ascertain who and how many of his passengers intend to alight at that place, and must wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and must, in any event, see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts it in motion. If he fails in any of these respects, and injury results therefrom, his employer is liable.

ACTION by the plaintiff, Mrs. Smith, to recover for personal injury received as she alighted from one of defendant's horse-cars, on which she had been riding as a passenger. Judgment in favor of plaintiff for one thousand dollars, and defendant appealed.

Hewitt, Walker, and Porter, for the appellant.

Storrett and Campbell, for the appellee.

McCLELLAN, J. The exceptions reserved go to the action of the trial court in refusing to give five charges requested by the defendant below. Of these the first, second, and third were abstract. We find no evidence in the record tending to show "that the moment the plaintiff started to get off the

car was simultaneous with the starting of the car," or "that the car was in motion when the plaintiff attempted to get off the car"; and these are the facts upon which these charges based defendant's right to a verdict. On the contrary, plaintiff's evidence tended to show that the car was standing still when she attempted to get off, and was started forward "with a jerk" when that attempt had been so far executed, as that she was in the act of stepping off, having one foot on the step, and the other approaching, if it had not touched, the ground; and the evidence of defendant tended to show that plaintiff was entirely off and free from the car before it was again started.

The fourth and fifth charges requested by defendant, and refused, present the real question involved on this appeal. They are as follows: "4. If the car was stopped a sufficient length of time for the plaintiff to get off the car, by the exercise of ordinary diligence, then you must find for the defendant, unless you believe from the evidence that the driver started the car in motion while the plaintiff was getting off the car, and knew she was getting off the car when he started the car. 5. If the defendant's car was stopped for a reasonable length of time, sufficient to have permitted the plaintiff to have gotten off safely by the exercise of reasonable diligence on her part, then you must find for the defendant, unless the evidence shows that defendant's car-driver knew, or had good reason to know, that plaintiff was in the act of getting off the car, or in a place of danger, when he started the car."

The doctrine of these charges, certainly as formulated in the last charge quoted, is thoroughly well established with respect to the ordinary railways of the country: *Raben v. Central Iowa R'y Co.*, 73 Iowa, 579; 5 Am. St. Rep. 708, and cases cited; *Strauss v. Kansas City etc. R. R. Co.*, 75 Mo. 185; 86 Mo. 421; *Gulf etc. R'y Co. v. Williams*, 70 Tex. 159; *Pennsylvania R. R. Co. v. Peters*, 116 Pa. St. 206.

Trains on such railroads are run on schedules. They stop only at designated stations, to receive and discharge passengers. The conductor knows in advance how many passengers are to alight at a given station. He may therefore determine with sufficient accuracy what would be a reasonable time for the train to stop to enable passengers for that station to alight, by the exercise of ordinary diligence on their part. The law therefore imposes on him the duty of holding the train for

such reasonably sufficient time. It is not practicable for him to keep a watch upon all the exits from a train of cars. Not infrequently he has other things to do at stations where his train stops. The law therefore does not impose on him the duty of seeing and knowing that all of the passengers intending so to do have alighted. Unless he knows or has good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed, and gotten off the train. These reasons, which support the proposition of the fifth charge as to cross-country steam-railways, do not obtain with respect to a horse-car railway. They have no stations, no regular stopping-places, no schedules. The driver cannot know beforehand where any passenger intends to alight, or how many passengers desire to get off at any place where he is signaled to stop. When he is signaled to stop, he must then inform himself by looking and seeing as to how many of his passengers desire and intend to alight. Without this he can have no conception of the length of time the car should remain stationary. Having rendered his car immovable by applying the brakes, he has nothing else to do than to see who intend getting off, and to know that they are safely off before the car is again started. It is entirely practicable for him to do this. The only exits are under his immediate observation, and there is no other duty incumbent on him at the time to divert his attention from them and the alighting passengers.

Our opinion is, that it is the duty of the driver of a horse-car, when signaled to stop, at least, to ascertain who and how many of his passengers intend to alight at that place, to wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts the car in motion. If he fail in any of these respects, and injury results from such failure, his employer is liable: *Thompson on Carriers*, 443; *Poulin v. Broadway etc. R. R. Co.*, 61 N. Y. 621; *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 181; 97 Am. Dec. 780; *Chicago City Railway Co. v. Mumford*, 97 Ill. 560. See also *North Birmingham etc. R'y Co. v. Calderwood*, 89 Ala. 247; 18 Am. St. Rep. 105.

Charges 4 and 5 were therefore properly refused, and the judgment is affirmed.

STREET-RAILROADS—NEGLIGENCE OF DRIVER. — The driver of a street-car who, after being notified to stop, checks his speed, and as a passenger is about to alight, starts the car again with a sudden jerk, is negligent: *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 131; 97 Am. Dec. 780, and note; *Augusta etc. R. R. Co. v. Randall*, 79 Ga. 305; *Allen v. Galveston etc. R'y Co.*, 79 Tex. 681. A person was in the act of getting upon a street-car when the driver started the car suddenly forward, and the person was injured. The company was held liable: *Eppendorf v. Brooklyn etc. R. R. Co.*, 60 N. Y. 195; 25 Am. Rep. 171.

RAILROADS—DUTY TO PASSENGERS TO STOP REASONABLE TIME. — The employees on a railroad train owe no duty to a passenger to stop at a station longer than a reasonable time; but it is negligence if they start, knowing that a passenger in the act of alighting was in a dangerous position: *Georgia etc. R'y Co. v. West*, 66 Miss. 310; *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and note.

ALABAMA GREAT SOUTHERN R. R. Co. v. HILL.

[99 ALABAMA, 71.]

PERSONAL EXAMINATION OF INJURED PERSON. — It is within the sound discretion of the trial court to order the surgical examination by experts of the person of a plaintiff seeking to recover for personal injury, although the defendant has no absolute right to have such order made and executed. The exercise of such discretion will be reviewed on appeal, and corrected if abused, but the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that justice requires the disclosure or more certain ascertainment of facts which can only be produced or fully elucidated by such examination, and that it may be made without danger to life or health, or the infliction of serious pain; and the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule stated, is such an abuse of discretion as will operate to reverse a judgment in favor of plaintiff.

PERSONAL EXAMINATION OF PARTY INJURED. — In an action to recover for personal injury, where it appears that plaintiff, a young unmarried woman, has submitted to several personal examinations by her physician, who states the nature, extent, and probable effects of her injuries, but whose statement is questioned by other physicians, the defendant is entitled to an order that plaintiff submit to a personal examination by a disinterested surgeon, and the refusal to grant such order is reversible error, when the examination will not endanger life or health.

RAILROADS—NEGLIGENCE—UNSAFE CONDITION OF TRACK. — **EXEMPLARY DAMAGES** are authorized from an injury to a passenger arising from an accident caused by a broken rail, when the evidence shows an unsafe condition of the track at that place, so long continued as to make the failure to discover and remedy it gross negligence, or equivalent to recklessness, wantonness, or intentional wrong towards the passenger on the part of the railroad company.

EVIDENCE—DECLARATION AS TO SPEED OF TRAIN. — In an action to recover for personal injury received in a railroad accident, the declara-

tion of a passenger to the conductor, made before the accident, that, in his opinion, the "engineer was whooping them up pretty fast that morning," is, by itself, inadmissible as part of the *res gesta*, or to establish the rate of speed at which the train was moving.

Edward Colston, Samuel F. Rice, and Denson and Wood, for the appellant.

Taliaferro and Smithson, for the appellee.

MCCLELLAN, J. This is an action for personal injuries alleged to have been sustained by the plaintiff in consequence of defendant's negligence, whereby a car on which plaintiff was being carried as a passenger was derailed and overturned. The injuries chiefly complained of, and relied on for the recovery which was sought and had in the court below, are alleged to be internal, and permanent in their nature, and very grievous, painful, and dangerous. Neither the fact of their infliction, nor their extent, character, or probable consequences, were determinable, except by expert examination of the plaintiff's person in a manner most objectionable to a young woman of delicacy and refinement, as she is shown to be. Such examination had been several times made by her attending physician, who stood ready to testify, and did testify in her behalf, as to the results of his investigation. Prior to the trial, on the day the trial was entered upon, and again pending the trial, after the plaintiff and her physician, and other physicians, had testified, the defendant moved the court for an order requiring plaintiff to submit to an examination by a reputable and disinterested physician, or physicians, to be appointed by, and to conduct the investigation under the direction and control of, the court, at the cost of the defendant. When this motion was last made, plaintiff's attending physician, Dr. Drennen, had testified fully as to her injuries, and Doctors Chew, Wyman, and Whelan, who heard his testimony, had been examined in respect to the injuries described by him, and had, to a greater or less extent, drawn his diagnosis in question. In support of the motion, the affidavits of three reputable and experienced physicians were put in evidence, to the effect that the proposed examination would not be painful, or at all hazardous; that the injuries described in the complaint—which were the same deposed to by Dr. Drennen—were not of a character to produce such nervousness as would render the examination dangerous to the life or health of the plain-

tiff; and that if she was able to attend the trial of her case, — which she did, — the plaintiff could, without risk, sustain the ordeal of the proposed investigation. On the other hand, two affidavits were offered against the motion. One by Drennen, that the plaintiff was a delicate and refined female, about nineteen years old, of nervous temperament, and had been rendered exceedingly nervous — even hysterical — by the shock of the accident, and the consequent ills which had since afflicted her, and that the proposed examination would involve danger to her health, though it appears from this affidavit that he himself had made “several thorough surgical examinations of the plaintiff,” of the kind proposed, without any ill results therefrom. The other opposing affidavit was by one of plaintiff’s counsel. He deposes to her age, delicacy of feeling, nervous temperament, low state of health, etc.; to the high standing of Drennen as a physician and surgeon, and to the facts that Drennen had made the physical examinations proposed by the motion, and would testify in regard thereto on the trial. On this state of facts, the court severally and successively overruled the motion each time it was presented, and refused to require the plaintiff to submit to a physical examination. The propriety of this action of the court is one of the leading questions presented by this appeal.

The authorities are somewhat conflicting on the point thus presented. A pioneer case, declaratory of the power of courts to require the plaintiffs, in actions of this character, to submit themselves to physical examination by experts, — a case, too, which is put forward by the appellant as a leading one in support of the right which the lower court denied it, — is that of *Walsh v. Sayre*, 52 How. Pr. 334, decided by the special term of the superior court of New York. This case was approved by the special term of common pleas of New York, in *Shaw v. Van Rensselaer*, 60 How. Pr. 143, in an *obiter dictum*, though an application for an inspection of the person was denied on the facts there presented. Subsequently the question came under review in the supreme court of that state, and Sayre’s case was, in effect, overruled, and the power of the courts to order an inspection of a plaintiff’s person was repudiated and denied: *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154. So that the law may be considered settled in the state of New York against the exercise of this power by the courts.

In Missouri, the course and history of judicial opinion on

the subject has been precisely the reverse of that exhibited in New York. The supreme court of Missouri first held that "the proposal to the court to call in two surgeons, and have the plaintiff examined, during the progress of the trial, as to the extent of her injuries, is unknown to our practice and to the law, . . . and the court had no power to enforce such an order": *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509. Afterwards this decision was seceded from, and the doctrine thoroughly established in that state, that the trial court has the power to require the plaintiff to submit to surgical examination as to the character of the injuries complained of, but that defendant has no absolute right to demand an order for such investigation, and such examination is a matter of discretion with the court, the exercise of which will not be interfered with, unless manifestly abused: *Shepard v. Missouri Pac. R'y Co.*, 85 Mo. 629; 55 Am. Rep. 390; *Sidekum v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39. The power of courts to this end is denied by courts in Illinois, in a very meager, unreasoned, and unsupported opinion of the supreme court, in which the subject is dismissed with the assertion that "the court had no power to make or enforce such an order": *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588.

It is believed that no other than the cases referred to can be found which deny the power of trial courts to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examinations in respect thereto. Of these, one has been expressly and repeatedly overruled; another appears to have been decided without due consideration of the question and investigation of the adjudications upon it; and the third, and only other, alone remains as an authority for the non-existence of the power. On the other hand, the Missouri cases *supra*, and many others, concur in the establishment of the following propositions: 1. That trial courts have the power to order the surgical examination by experts of the person of a plaintiff who is seeking a recovery for physical injuries; 2. That the defendant has no absolute right to have an order made to that end and executed, but that the motion therefor is addressed to the sound discretion of the court; 3. That the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse; 4. That the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice re-

quire the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain; 5. That the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of the discretion lodged in the trial court as will operate a reversal of the judgment in plaintiff's favor: *Thompson on Trials*, sec. 859; *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375; *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724; *Stuart v. Havens*, 17 Neb. 211; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659; *Miami etc. Co. v. Baily*, 37 Ohio St. 104; *International etc. R'y Co. v. Underwood*, 64 Tex. 463; *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719; 14 Am. St. Rep. 189; *Sibbey v. Smith*, 48 Ark. 275; 55 Am. Rep. 584; *White v. Milwaukee City R'y Co.*, 61 Wis. 536; 50 Am. Rep. 154.

The doctrine of these authorities has been fully recognized in Alabama, in a case decided at the present term: *McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25; and has quite recently been acted upon by this court in a proceeding for divorce, even to the extent of requiring both the complainant and the respondent to submit their persons to expert physical examination: *Anonymous*, 89 Ala. 291; 18 Am. St. Rep. 116. See also *Anonymous*, 35 Ala. 226. Indeed, the propriety of a resort to this practice in divorce cases, even with respect to the defendant, has been long established: *Davenbakh v. Davenbakh*, 5 Paige, 554; 28 Am. Dec. 443; *Le Barron v. Le Barron*, 35 Vt. 365; *Newell v. Newell*, 9 Paige, 25.

It is apparent from the adjudged cases that the statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant—the rule fairly deducible from the opinions—is, that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error. An examination of those cases which are most emphatic in holding this matter to be in the trial court's discretion, free from appellate inter-

ference except in the contingency of manifest abuse, demonstrates the soundness of the construction we have placed on them. The Missouri cases, for example, while affirming the broad doctrine of non-interference, except where discretion has been manifestly abused, in each instance give reasons not reversing *nisi prius* action, which show that that action, upon the strictest rules of appellate inquiry, was free from error. Thus the reasons given in Shepard's case was, that "the order asked by the defendant was unreasonable, in that it asked that this lady should submit to personal examination, not by one skilled surgeon, but by at least three; . . . and this, when she had once submitted to such an examination by Dr. Jackson, and again offered to submit to an examination by an eminent and reputable surgeon and physician of the city of St. Louis, where the cause was pending; but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination": *Shepard v. Missouri Pac. R'y Co.*, 85 Mo. 634; 55 Am. Rep. 390. The refusal of the motion in the case of *Owens v. Kansas City etc. R'y Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, was based on the ground that without such examination there was abundant evidence as to the nature, cause, and extent of the injuries complained of; in other words, the appellate court could see that a proper case had not been made for the examination, in that no necessity for it was shown, and the ends of justice could be met without it. The facts in *Sidckum v. Wabash etc. R'y Co.*, 93 Mo. 400, 3 Am. St. Rep. 549, were strikingly like those arising on the motion in the present case, so far as testimony adduced by plaintiff is concerned. The application was made before the trial was entered upon, and refused "for the time being." The supreme court say: "The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being, and as defendant did not again renew its application for such order at any other stage of the proceeding, the court may have well concluded that, after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bane, which we have given in substance [and which was of much the same character as that given by Dr. Drennen in the case at bar], defendant did not deem it necessary to renew its motion, or to insist thereon, but had abandoned the same." The clear and necessary implication is, that had the motion been renewed on a state of facts precisely those in-

volved here, omitting the affidavits and evidence of the physicians called by the defendant, its refusal would have been an error requiring the reversal of the judgment.

What we have said applies also to the other cases cited, except that of *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584, which states the rule as deduced from the adjudged cases to be, "that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition,—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion, and its action is subject to review in case of abuse." And the judgment below was reversed and the cause remanded, really on the ground that a proper case had been made for the exercise of the court's discretion favorably to the application for an examination, and its refusal to so order was therefore a reversible error.

Guided by the rule deducible from these authorities, rather than by the expressions used when they attempt a formulation of it, we shall consider whether the defendant clearly presented a case upon which the lower court should have ordered the examination moved for. We are satisfied from the evidence which was before the court when the last application was made that such an examination would not have involved any ill consequences to the plaintiff. She had submitted to be so examined several times by Dr. Drennen safely, and even without pain. The fact that she was of a nervous temperament or in a nervous condition involved no tenable objection, especially in view of the opium habit which she had contracted, and which could, without hurt to her, have been utilized to allay nervousness. Her delicacy and refinement of feeling, though, of course, entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant on the other, the law cannot hesitate; justice must be done. Was it essential to the ends of justice that plaintiff should submit to this examination? We think it was. It is true that Dr.

Drennen had made the examination, and had fully deposed to the injuries complained of. But he was the plaintiff's physician and her witness. His sympathies were naturally with her, operating a bias in her favor, even without consciousness of it on his part. Moreover, as we have said, his conclusions and opinions from the premises he testified to did not meet the approval or concurrence of the several other reputable surgeons and physicians who were examined as to their conclusions from the facts stated by him. A serious doubt was thus raised as to what were the real facts in respect to the injuries. To a satisfactory solution of that doubt the examination moved for was essential. The result of such examination by skilled and disinterested surgeons, under the directions of the court, would necessarily have been either to put the plaintiff's claim in this regard on impregnable ground, or to have destroyed it altogether; and in either case there would have been an unquestioned assurance that justice had been done,—an assurance which finds no secure anchorage in the present record. Our opinion is, that the court erred in overruling defendant's motion for the examination.

We shall notice briefly only such other assignments of error as are insisted on in argument.

We discover no error in the rulings of the trial court on the question of punitive damages. There was evidence in the case tending to show that the cross-ties, or a considerable portion of them, under the track at the point of the derailment of the car in which plaintiff was riding—the wreck being the result of a broken rail—were “unsound,” “decayed,” “rotten”; that the rail which broke was an “old rail,” as were others along there; and that the defendant company was “constantly repairing that old track with old rails.” With the weight or sufficiency of this evidence we have nothing to do. Whether or not its tendencies were entirely rebutted by other testimony is also beyond our inquiry. Those were questions for the jury. We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness, such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it, as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of. And if the jury found the facts to be in accordance with this tendency of the testi-

mony, they were authorized to return a verdict for exemplary damages.

It has been many times ruled by this court that the refusal of the lower court to grant a new trial is not revisable.

The declaration of Allen to the conductor, made before the accident, indicating Allen's opinion that the "engineer was whooping them up pretty fast that morning," was, in our opinion, inadmissible: *Lake Erie etc. R'y Co. v. Zoffinger*, 10 Ill. App. 252; *Mobile etc. R. R. Co. v. Ashcraft*, 48 Ala. 15. Facts may possibly be adduced on another trial which will legalize this evidence; but they do not exist in this record.

We discover no error in the other matters urged in argument.

Reversed and remanded.

PERSON, EXAMINATION OF, BY EXPERTS. — A wife, suing her husband for divorce on account of the abnormal size of his parts, rendering sexual intercourse impossible, must submit to an examination of her person, to show that the fault lies not with her: *Anonymous*, 89 Ala. 291; 18 Am. St. Rep. 116. It is in the sound discretion of the court whether or not to allow a personal examination of a plaintiff in an action for personal injuries: *Sidokum v. Wabash etc. R'y Co.*, 93 Mo. 460; 3 Am. St. Rep. 549, and extended note. A plaintiff may be compelled to submit his person to a reasonable examination by surgeons, in order to ascertain the extent of his injuries: *Hew v. Lowery*, 122 Ind. 225; 17 Am. St. Rep. 355, and note; *Gulf etc. R'y Co. v. Norfleet*, 78 Tex. 321.

RAILROADS — LIABILITY FOR DEFECTS IN ROAD-BED. — A railroad company permitting its road-bed to become defective is chargeable with negligence, and responsible in damages for injuries caused thereby: *Taylor etc. R'y Co. v. Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316, and note; *McFee v. Vicksburg etc. R. R. Co.*, 42 La. Ann. 790; *Bowbert v. Railway Co.*, 81 S. C. 309; *Texas etc. R'y Co. v. Johnson*, 75 Tex. 159; *Florida R'y etc. Co. v. Webster*, 25 Fla. 395.

WILLIAMS v. FLOWERS.

[90 ALABAMA, 186.]

NEGOTIABLE INSTRUMENTS — STIPULATION IN NOTE FOR COSTS OF COLLECTION — USURY. — A stipulation in a note, by which the maker agrees to pay all costs for collecting it, not less than ten per cent, on failure to pay at maturity, includes an attorney's reasonable fee, and does not render the note usurious.

COSTS INCLUDE ATTORNEY'S FEE. — The term "costs" denotes in its legal sense not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover from his client for his professional services.

USURY — CONTRACT TO PAY ATTORNEY'S FEE. — An agreement to pay a reasonable attorney's fee, which the payee of a note would have to pay if forced to collect it by suit, in addition to legal interest, does not render the note usurious.

Mountjoy and Tomlinson, for the appellants.

A. T. London, for the appellee.

CLOPTON, J. A demurrer was interposed to so much of the bill as seeks to enforce the collection of solicitor's fees under the following stipulation, contained in the note upon which the bill is founded: "It is further agreed that the undersigned [makers] shall pay all costs for collecting the above, not less than ten per cent, on failure to pay at maturity." The special grounds of demurrer are, that the term "costs for collecting" does not include solicitor's fees for bringing the suit, and if it does, that the contract is usurious. In practice, costs and fees are different in their nature; costs being an allowance to a party for expenses incurred in prosecuting or defending a suit; and fees being compensation to an officer for services rendered in the progress of a cause: *Tillman v. Wood*, 58 Ala. 578. In common parlance, the compensation paid an attorney is denominated a fee, in contradistinction to the costs incident to the judgment; but in its legal sense, the term "costs" denotes not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover from his client as remuneration for his professional services: *Rapalje and Lawrence's Law Dict.* It is manifest that the parties meant that the term "costs for collecting," as used in the note, should be understood in its broadest signification; otherwise the stipulation would have no effect, for without it defendants would be liable to the costs incident to the decree. We therefore construe the term as having been intended to include the compensation which the payee of the note might have to pay an attorney for bringing a suit to enforce its collection.

It is well settled by our decisions that an agreement to pay the reasonable attorney's fees which the payee of a note would have to pay if forced to collect by suit, in addition to the legal interest, does not render the contract usurious. Defendants contend that the terms of the agreement to pay all costs for collecting, not less than ten per cent, without reference to the reasonableness of the charges, makes the contract usurious. In *Munter v. Linn*, 61 Ala. 494, the agreement was to pay, if it became necessary to institute legal proceedings to recover the amount of the notes, the fee of the attorney employed, "such fee to be ten per cent of the amount sued for and re-

covered," — an unconditional agreement to pay ten per cent. It was held that this stipulation does not constitute the contract usurious, but that the creditor could recover only a reasonable fee, though he stipulated for a larger sum or per cent. In *Wood v. Winship*, 83 Ala. 424, 3 Am. St. Rep. 754, the note obligated the maker to pay principal, interest, and ten per cent attorney's fees. It was ruled that the note was sufficient to support a judgment by default for the entire amount due, including attorney's fees, without the intervention of a jury. These decisions show that an agreement to ten per cent of the amount recovered, in addition to the legal interest, is not itself usurious. The amount stipulated must be reasonable, or at least not obviously excessive; for no form which may be given to the contract — no device — can evade the statute against usury, if the intent appears, or is shown, to secure a profit in addition to the legal interest and the reimbursement of the creditor of the expenses which he may incur in collecting the note. The chancellor referred to the register the ascertainment of what was a reasonable attorney's fee, and he reported that ten per cent was reasonable. The proof fully sustains his report. There is not only no evidence tending to show a purpose to take usury, but the proof overcomes the defense.

Affirmed.

BILLS AND NOTES — COSTS — ATTORNEY'S FEES. — A stipulation in a note for costs includes attorney's fees as well as court costs: *Montgomery v. Crosthwait*, 90 Ala. 553, *post*, p. 832. But see note to *Ma v. Knox*, 88 Am. Dec. 182, where it is said that "expenses" or "costs" does not include counsel fees.

BILLS AND NOTES — USURY — ATTORNEY'S FEES. — The stipulation in a promissory note to the effect that upon the failure of the maker to pay it when it becomes due he will pay "all attorney's fees, and other costs and charges incurred in its collection," does not render the contract usurious: *Billingsley v. Dean*, 11 Ind. 331.

WALDROP v. FRIEDMAN.

[90 ALABAMA, 157.]

MORTGAGES — LIMIT FOR REDEMPTION — LACHES. — A suit by the mortgagor against the mortgagee in possession, to redeem and for an accounting, is not barred until the expiration of ten years from the time of taking possession; and until the expiration of such time, no question of laches, delay, or acquiescence can arise against the mortgagor.

EXECUTION PREMATURELY ISSUED — COLLATERAL ATTACK. — An execution prematurely issued on a valid judgment is irregular and voidable, but not void; and although it may be set aside in a direct proceeding, a sale under it cannot be collaterally impeached.

EXECUTIONS — LEVY AFTER RETURN DAY. — A justice's execution cannot properly be levied after the expiration of the latest return day allowed by law, whether it specifies a return day or not. A levy after the expiration of such day is void, and an order of sale, and sale founded on it, are also void.

Hargrove and Van de Graaff, for the appellants.

Wood and Wood, for the appellee.

MCCLELLAN, J. The present bill is exhibited to redeem a tract of land from mortgagees in possession. By appropriate allegations, it anticipates a defense resting on the acquisition of an independent title by purchase at a sale made under a *venditioni exponas*. The order of sale was made by the circuit court of Tuscaloosa, on a judgment rendered by a justice of the peace against complainants' ancestor, an execution issued thereon, a levy thereof on the land sought to be redeemed, and a return of all the papers into the circuit court. The infirmity in respondents' title under these proceedings, which is relied on in reply to the anticipated defense, results from the facts, which are shown by the exhibits to the bill, that the execution was issued by the justice before the lapse of five days after the judgment, and was levied by the sheriff after the lapse of sixty days from the date of its issuance, and also from the date at which it could have been regularly issued, that being the longest period which the statute allows between the issuance and return day of such writs: Code, sec. 3345. Demurrers were interposed to the bill, setting up that it showed, — 1. That respondents acquired a good legal title through the sheriff's sale; 2. That they acquired a good equitable title at said sale; 3. That the complainants "are guilty of such laches as to defeat any equity of the bill; and 4. That complainants are estopped by reason of the acquiescence of their ancestor for years in the ownership and possession of

defendants." Each of these demurrers was sustained, and this appeal is prosecuted from the decree in that behalf.

The ten years within which a mortgagor may redeem from his mortgagees in possession not having elapsed in this case, as is manifest from the averments of the bill, we are unable to see what relevancy the inquiries as to laches, delay, acquiescence for years, etc., raised by the demurrer, can have to any material issue presented by the record. It seems clear that if the sale under the order of the circuit court was merely irregular, and hence voidable only, it cannot be drawn in question upon a collateral attack, such as this bill attempts, however promptly made, and whether made by the heir or ancestor; and on the other hand, if that sale was void, — not merely irregular, and voidable only on direct assault, — we apprehend that no delay, laches, or acquiescence short of ten years in duration would operate to defeat the right of redemption now asserted by complainants. Counsel on either side recognize the immateriality of these inquiries, and address themselves mainly to the question of the validity of the sale; and that question alone, we think, need be decided.

The judgment against complainants' ancestor was rendered by the justice on the twenty-sixth day of January, 1878. Execution was issued January 29, 1878. The levy was made on April 10, 1878, — seventy-one days after the teste of the writ, and sixty-eight days after the writ might have regularly issued.

Upon these facts two contentions are predicated by the appellants: 1. That the sale was void, because the execution was issued before the lapse of five days after judgment, as required by the present and former statute on the subject. We cannot admit the soundness of the position. On the contrary, we conceive it to be well settled that the fact that an execution — the judgment being a valid one — is issued at or within a time during which the statute says it shall not issue does not render the writ void, but is an irregularity merely, which may be remedied in a direct proceeding seasonably instituted, but which avails nothing in aid of a collateral impeachment of the proceedings under it, such as is here attempted: *Sandlin v. Anderson*, 76 Ala. 403; *Leonard v. Brewer*, 86 Ala. 390; *Street v. Tutwiler*, 68 Ala. 107; *Carson v. Walker*, 16 Mo. 68; *Freeman on Executions*, sec. 25.

The other position taken by the appellants is, that the execution was levied after the return day fixed by the statute.

The law then in force was the same as the present statute, as to the limit of time within which the execution from justices' courts should be made returnable: Code 1876, secs. 3627, 3648. And we apprehend that if there should be an omission to have the return day expressed in the face of the writ, it would be held to be returnable on the last day to which the justice, in his discretion, might have made it run; the principle involved in such a contingency being the same as arises when a day beyond the extremest limits of discretion, or a day which is past, is specified, and holds the officer to the duty of execution and return within the statutory period, regardless of the language of the writ: *Samples v. Walker*, 9 Ala. 726; *Wofford v. Robinson*, 7 Ala. 489; Freeman on Executions, sec. 44. But whether any day or a proper day be specified or not, the writ in no case can be kept alive in the hands of the officer after the latest date at which the statute requires it to be returned. The writ in this case, whatever time was expressed on its face as the return day, or whether any time was so expressed, — and the record does not enlighten us on this point, — could not be levied after the lapse of sixty days from the 29th of January, 1878, and the levy which was in fact made on April 10, 1878, beyond the latest possible return day, was absolutely void: *Morgan v. Ramsey*, 15 Ala. 190; *Smith v. Mundy*, 18 Ala. 182; 52 Am. Dec. 221; Freeman on Executions, sec. 106; *Farmers' Bank v. Reid*, 3 Ala. 299; *Barden v. McKinnis*, 15 Am. Dec. 522, note; *Barnard v. Stevens*, 2 Aiken, 429; 16 Am. Dec. 734.

The levy upon which the order of sale made by the circuit court was predicated being void, that court was without jurisdiction, its order was likewise void, and the sale and conveyance by the sheriff to defendants' grantors passed no title into them: *Jones v. Calloway*, 56 Ala. 46.

The demurrers which set up that title in bar of the relief sought by complainants should have been overruled.

The decree of the chancery court is reversed, and a decree will be here entered overruling all the demurrers sustained below.

Reversed and remanded.

MORTGAGE — TIME WITHIN WHICH A MORTGAGOR MAY REDEEM. — After a foreclosure sale the mortgagor may redeem within the period fixed by statute, which, in Arkansas and Minnesota, is one year: *Wood v. Holland*, 53 Ark. 69; *Cullerier v. Brunelle*, 37 Minn. 71. But where there has been a defective foreclosure, no foreclosure, or a foreclosure not binding upon the

party seeking to redeem, the period within which redemption may be sought against the mortgagee in possession, or against the one who claims under the defective foreclosure proceedings, must be computed by a different rule. In California, the action to redeem may be instituted at any time after the obligation becomes due, and before foreclosure, regardless of the running of the statute of limitations against the principal obligation, unless the mortgagee has previously acquired a title to the premises by five years' possession adversely: *Hall v. Arnott*, 80 Cal. 348. In Indiana, the period for redemption is fifteen years: *Barr v. Vanaletine*, 120 Ind. 590; in Minnesota, ten years: *Rogers v. Benton*, 39 Minn. 39; 12 Am. St. Rep. 613. In New Hampshire, a mortgagor, by permitting the mortgagee to hold possession of the mortgaged premises for twenty years without an accounting, loses his right to redeem: *Clark v. Clough*, 65 N. H. 43. In Alabama, a mortgagor may redeem within a reasonable time from the mortgagee, who has purchased at his own sale under a power in the mortgage without the mortgagor's assent: *McCall v. Mash*, 89 Ala. 487; 18 Am. St. Rep. 145, and note; *Thomas v. Jones*, 84 Ala. 302.

LIMITATION OF ACTIONS — LACHES. — An action instituted within the period of limitation prescribed by the statute cannot be defeated by the defense of laches: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412.

EXECUTIONS PREMATURELY ISSUED, EFFECT OF. — Where a valid judgment exists, an execution may properly issue thereon, although the judgment has not actually been entered of record: *Weightley v. Matson*, 125 Ill. 64; 8 Am. St. Rep. 335; *Fontaine v. Hudson*, 93 Mo. 62; 3 Am. St. Rep. 515. An execution prematurely issued on an existing judgment, though erroneous, is not void, and cannot be attacked collaterally: *Stewart v. Stocker*, 13 Serg. & R. 199; 15 Am. Dec. 589, and note; *Scribner v. Whitcher*, 6 N. H. 63; 23 Am. Dec. 708.

EXECUTIONS — LEVY AFTER RETURN DAY. — An officer cannot hold an execution until after the expiration of the return day, and make a valid levy thereunder; such execution becomes *functus officio*, confers no authority whatever, and an attempted levy and sale by virtue of it are nullities: *Paul v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836; *Dixon v. White Sewing-Mach. Co.* 128 Pa. St. 397; 15 Am. St. Rep. 683; *Osborn v. Cloud*, 23 Iowa, 104; 23 Am. Dec. 413, and note; *Hargrave v. Penrod*, 1 Ill. 401; 12 Am. Dec. 201.

DONNOR v. QUARTERMAN.

[90 ALABAMA, 164.]

CO-TENANCY — PARTITION — ACCOUNTING — PARTIES. — When, after the filing of a bill for partition, and for an accounting for rents and profits, between tenants in common, one of them dies, no account can be had against his estate, unless his personal representative is made a party; but the claim for an accounting may be abandoned, and partition had, without making his executor or administrator a party.

CO-TENANCY — ACQUISITION OF TAX TITLE BY CO-TENANT. — A co-tenant in possession under an agreement expressly binding him to pay the taxes in consideration of occupancy without the payment of rent cannot by allowing the land to be sold for unpaid taxes and redeeming therefrom acquire any title as against his co-tenants. The tax title thus acquired inures to the benefit of them all.

Co-TENANCY.—PURCHASE OF TAX TITLE against the common property by one co-tenant inures to the benefit of all the co-tenants. The purchaser thereunder can claim no benefit, except as a basis to compel the remaining co-tenants to reimburse him for their *pro rata* share of the common burden on the land.

Co-TENANCY—PURCHASE OF TAX TITLE BY TENANT IN POSSESSION—PARTITION TO PREVENT ADVERSE POSSESSION.—When a co-tenant in possession of the common property, under an express agreement binding him to pay the rent, allows the land to be sold for unpaid taxes, and becomes the purchaser by redeeming therefrom, the other co-tenants may repudiate the contract, and by partition proceedings prevent the adverse occupancy under the tax title from maturing into a perfect title by adverse possession.

Co-TENANCY—PARTITION—EQUITY JURISDICTION.—Jurisdiction to partition lands among co-tenants is an independent head of equity jurisdiction, and when the statute is merely declaratory of such jurisdiction, it will be exercised by a court of equity on its own established principles, and with the use of its own better and more flexible modes of procedure, unembarrassed by the procrustean rules which cramp the statutory jurisdiction of courts of law.

Co-TENANCY—PARTITION.—Two tenants in common may unite in a bill for partition against a third co-tenant, and may jointly elect to consider their several moieties as one moiety, and to have it set apart to them as one undivided fractional share of the whole.

Co-TENANCY—RIGHT TO PARTITION.—Every co-tenant is entitled to demand partition, though it may be inconvenient, injurious, or even ruinous to one or more of the parties in interest.

Co-TENANCY—PARTITION—IMPROVEMENTS.—Equity will, if possible, when making partition among co-tenants, give the benefit of any improvements made on the premises to him who has erected or made them, and this is done by assigning to such part owner the portion of the estate on which such improvements are placed.

S. W. John, and Mallory and Quarles, for the appellants.

John C. Reid, for the appellees.

SOMERVILLE, J. The bill as amended is one for the partition of real estate among tenants in common, and for an account of rents and use and occupation against the defendants, who are alleged to hold adversely to the plaintiffs under a tax title.

1. One of the defendants, Mrs. Sarah H. Hillyard, who is alleged to have owned an undivided five-eighths interest in the premises, is shown to have died since the bill was filed. As one purpose of the suit was to charge her with rents, and for use and occupation, it is insisted that the suit should have been revived against her personal representative, who became a necessary party after her decease.

It is true that no account can be taken between the parties, so as to establish a debt against the estate, unless it is repre-

sented by an administrator or executor. And if an account for the rents and profits had been ordered against the estate of Mrs. Hillyard, or if the facts of the case authorized such a decree, and the complainants had insisted on such an account by cross-assignments of errors, we would reverse the decree for the want of a necessary party defendant: *Tindal v. Drake*, 51 Ala. 574; *Jones v. Richardson*, 85 Ala. 463. But no decree has been asked or rendered against the estate of Mrs. Hillyard, or against the defendants Donnor and wife for rents, or for use and occupation. The complainants may have abandoned the prosecution of this phase of the case, and if so, the personal representative of Mrs. Hillyard will not be a necessary party. The evidence, moreover, as said in the chancellor's opinion, shows that Donnor and wife have been in the exclusive enjoyment of the property since the year 1880, and that they, and not the estate of Mrs. Hillyard, owe the complainants for the occupation of the property, if any one.

2. The next inquiry relates to the tax title acquired by the defendant Mrs. Donnor by transfer from the state, under which the defendants are alleged to have set up an adverse occupation against their co-tenants, the complainants. There are two grounds, on either of which we must regard the acquisition of this tax title as inuring to the common benefit of all the joint owners of the property on which the tax was assessed. 1. The contract of December 10, 1880, between the complainants and the defendants, under which the defendants were allowed to occupy the premises free of rent, imposed on each of the defendants the express duty to pay the taxes on the property, in addition to keeping the improvements well insured against the loss or destruction by fire. 2. The relation of tenants in common existed between the parties. For each of these reasons, Mrs. Donnor was disqualified to acquire any title founded on her own default in neglecting to pay the taxes. The transfer from the state of this outstanding tax title must therefore be construed to operate only as a payment of the taxes, inuring to the equal benefit of all the part owners, and not as a valid purchase of the interest of her co-owners: *Bailey v. Campbell*, 82 Ala. 342; *Jackson v. King*, 82 Ala. 432; 11 Am. & Eng. Ency. of Law, 1032-1086. The purchaser so situated, according to the sounder view, can claim no benefit under such tax title, except as a basis for compelling his other co-owners to reimburse him for their *pro rata* share of the common burden on the land: *Freeman on Cotenancy*, 2d ed., sec. 158.

3. We need only add that we are satisfied from the testimony, as was also the judge of the city court, that the defendants, Donnor and wife, signed the agreement above referred to, with a full knowledge of its contents. How far it may have been binding or otherwise on Mrs. Donnor by reason of the fact of her coverture we need not discuss, as the adverse assertion of title by her and the other defendants in possession, coupled with the violation of their assumed obligation to pay taxes on the property, fully justified the complainants in repudiating the continued binding force of the agreement on themselves, which they have undertaken to do by the filing of this bill. If this were not so, the complainants would be without a remedy to prevent the known adverse occupancy of the defendants, under the tax title, from maturing into a perfect title against themselves: *Wells v. Sharer*, 78 Ala. 142; *Hughes v. Anderson*, 79 Ala. 209.

4. One of the main contentions of the appellants, as we understand it, is, that the chancery court can exercise its jurisdiction to partition property among joint owners or tenants in common only by following the mode of procedure prescribed by statute for the regulation of like proceedings by the probate court, where the ownership of the respective parcels is determined by lot: Code 1886, sec. 3244. The statute, it is true, declares that "the chancery court shall have concurrent jurisdiction with the probate court to divide or partition, or to sell for division or partition, any property, real, personal, or mixed, held by joint owners or tenants in common": Code 1886, sec. 3262. And while the original jurisdiction of chancery courts to sell the lands of adults for division, without consent, is purely statutory in this state, not having been exercised before the Code of 1886, the jurisdiction to partition such lands among co-owners is an acknowledged and independent head of equity jurisdiction, long exercised both in this country and in England. And it is well settled that this jurisdiction, of which the statute is merely declaratory, will be exercised by a court of equity on its own established principles, and with the use of its own better adapted and more flexible modes of procedure, unembarrassed by the procrustean rules which cramp the statutory jurisdiction of courts of law: *Marshall v. Marshall*, 86 Ala. 386; *Lyon v. Powell*, 78 Ala. 351; *Wilkinson v. Stuart*, 74 Ala. 198; *Freeman on Co-tenancy*, 2d ed., sec. 428, and note 560; *Rutherford v. Jones*, 14 Ga. 521; 60 Am. Dec. 655; *Story's Eq. Jur.*, secs. 646-658.

The practice of the chancery court in this state has always been to administer this branch of its jurisdiction on strict equitable principles and by equitable modes of procedure; and we hold that this court cannot be confined to the statutory mode prescribed for the partition of property by the probate court: Code 1866, sec. 3237. This is too obvious, from both reason and authority, to admit of doubt, or to require argument.

5. There is no error in that part of the decree of the court allowing the two female complainants, who are each shown to be tenants in common in the property, to unite in the bill for partition, and to jointly elect to consider their several moieties as one moiety, and to have it set apart to them as one undivided fractional share of the whole: Freeman on Cotenancy, sec. 459.

6. So it may be considered as settled by the weight of authority, that every co-tenant is entitled to demand a partition of the common property, although such partition may be inconvenient or injurious—it has sometimes been said, or even ruinous—to one or more of the parties in interest: Freeman on Cotenancy, secs. 433, 438; 3 Pomeroy's Eq. Jur., sec. 1389. Or, as said by Mr. Adams in his work on equity (page 230), it "may be demanded as matter of right, notwithstanding the difficulties by which a division may be embarrassed, or the mischief it may entail on the property."

7. And the rule in equity, in making partition among tenants in common, is for the court, if practicable, to so order the partition as to give the benefit of any improvements made on the premises to him who may have erected or made them; and this is done by assigning to such part owner the portion of the estate on which such improvements are situated: *Wilkinson v. Stuart*, 74 Ala. 198; *Sanders v. Robertson*, 57 Ala. 465; 3 Pomeroy's Eq. Jur., sec. 1389; Freeman on Cotenancy, sec. 509; 11 Am. & Eng. Ency. of Law, 1104 et seq.

We discover no error in the record, and the decree is affirmed.

CO-TENANCY — ACQUISITION OF TAX TITLE BY ONE CO-TENANT. — One tenant in common cannot set up a title acquired at a tax sale against his co-tenant: *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586, and note; *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288; *Fallon v. Childester*, 46 Iowa, 588; 22 Am. Rep. 164; *Weure v. Van Meter*, 42 Iowa, 128; 20 Am. Rep. 616; *Delashmuth v. Parrent*, 39 Kan. 548; *Phipps v. Phipps*, 39 Kan. 495.

PARTITION — JURISDICTION. — Chancery has jurisdiction in partition suits: *Holloway v. Holloway*, 97 Mo. 628; 10 Am. St. Rep. 332, and note; *Rutherford*

v. *Jones*, 14 Ga. 521; 60 Am. Dec. 655, and note; *McQueen v. Turner*, 91 Ala. 272.

PARTITION — RIGHT TO. — Partition in equity is a matter of right, and not of discretion, where the complainant is entitled to partition at law: *Wiseley v. Findlay*, 3 Rand. 261; 15 Am. Dec. 712; *Bierce v. James*, 87 Tenn. 538.

CO-TENANCY — IMPROVEMENTS. — A co-tenant who makes improvements upon the premises is entitled to payment from his co-tenants for the same: *Shepherd v. Jernigan*, 51 Ark. 275; 14 Am. St. Rep. 50, and note; *Killmer v. Fuchner*, 79 Iowa, 722; 18 Am. St. Rep. 392; *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387; *McGee v. Hall*, 28 S. C. 562. *Contra*, see *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293, and note.

HOWZE v. DEW.

[90 ALABAMA, 178.]

CO-TENANCY — MORTGAGE OF UNDIVIDED INTEREST OF ONE. — Where seven children, as heirs of their deceased father, are tenants in common of lands lying in several different counties, a mortgage by one of them of his interest as heir and distributee in the land lying in a specified county will convey only his undivided one-seventh interest in the land lying in the county specified, and not his undivided interest in all the lands lying in the different counties; and if, on partition of all the lands in the different counties, one half of the mortgaged tract is allotted to the mortgagor as his entire interest in all the lands, the estate of the mortgagee is not thereby increased or extended.

CO-TENANCY — NOTICE — TAX SALE. — Notice to one tenant in common of proceedings to subject the common property to sale for unpaid taxes is not notice to the other tenants, nor does it prejudice their rights. Such sale, without notice to all the co-tenants, is void.

MORTGAGES. — **TAX TITLE ACQUIRED BY MORTGAGEE** in possession will not prevail against the mortgagor or his devisee.

Watts and Son, for the appellants.

Taylor and Johnston, for the appellee.

McCLELLAN, J. William S. Phillips died in 1872, owning sundry parcels of land in Dallas County, and one tract of 320 acres situated in Perry County. He left surviving him seven children, to whom all of his lands in both counties descended as tenants in common. William M. Phillips, one of the co-tenants, while residing on the Perry County tract of land, on January 20, 1874, executed a mortgage to appellant Howze, the granting clause of which, so far as it concerns the property involved here, is in the following language: "We do hereby grant, bargain, sell, and convey to the said John Howze the following personal property, to wit:

also, the following real estate lying in the county of Perry and state aforesaid, to wit, all of the interest of the said William M. Phillips, as heir and distributee of William S. Phillips, deceased." This conveyance contains only the following express covenant: "And the said William M. Phillips hereby declares that the above conveyed property is his own, and that there is no lien or encumbrance upon the same, except" a certain mortgage conveying part of the personalty.

About September, 1876, a bill was filed in the chancery court of Dallas, by some of the tenants in common, against William M. Phillips and the other co-tenants, for partition among them of all the lands which they held as heirs of William S. Phillips in both counties, and also for partition of a parcel of land lying in Perry County, containing 320 acres, which had descended to them from their mother, Louisa J. Phillips. The final decree in that cause, rendered July 2, 1877, allotted to William M. Phillips, as his one-seventh share of all the lands in both counties, and descending from both ancestors, 160 acres of the 320 acres in Perry County, which had belonged to William S. Phillips. William M. Phillips devised this land to his wife, Amanda C. (now Amanda C. Dew), and departed this life in October, 1881. His will was duly probated. The appellant Howze, default having been made in the payment of the debt secured by the mortgage, sold the land thus allotted to William M. Phillips, under the power contained in the instrument, in March, 1882, and himself became the purchaser. He entered into possession on the day of sale, and has since held it. This suit is by Mrs. Dew, formerly Amanda C. Phillips, claiming under the will of her first husband, for the recovery of possession of the land, and damages for its detention.

One of the prominent questions presented by the exceptions reserved on the trial involves the construction of the mortgage in respect to the quantity of land conveyed by it. The evidence is without conflict, that at the time of executing the instrument, the mortgagor, as an heir of William S. Phillips, deceased, owned an undivided one-seventh interest in each of the several parcels of land lying in Dallas County, and in one tract of 320 acres situated in Perry County, and that he was seised of no other or greater estate or interest in any one of said parcels. He thus held an undivided one-seventh interest, in common with his brothers and sisters, in

a house and lot in the city of Selma, a like interest in a plantation lying on the Cahaba River, in Dallas County, and the same interest and estate, and no more, in the tract of 320 acres lying in Perry County. There is no controversy but that it was competent for William M. Phillips to have conveyed his entire interest in these lands, or that had he done so, his grantee would have taken, upon partition, whatever was allotted to him in severalty, whether lying in the one or the other county. It is equally clear in principle and on authority that a conveyance by Phillips of his undivided interest in any one of the separate parcels would have constituted his grantee a tenant in common with the holders of the other undivided interests, and entitled him, on partition, to have allotted to him in severalty one seventh of that parcel: *Freeman on Cotenancy*, sec. 208; *Butler v. Rays*, 25 Mich. 53; 12 Am. Rep. 218; *Primm v. Walker*, 38 Mo. 98; *Markoe v. Wakeman*, 107 Ill. 262.

It may be, too, that had Phillips undertaken to convey the tract in Perry County as an entirety, his deed would have been allowed to operate primarily so as to pass a one-seventh interest to his grantee, and on partition, if his allotment in severalty was carved out of this tract, the title he acquired thereto would inure to the benefit of his grantee, and vest the fee in the latter. This result is denied by some authorities, which hold such a deed absolutely void, though the weight of adjudication, and the better reason, support the proposition, that such a conveyance should be accorded full force and effect as against any interest the grantor has or subsequently acquires in the land: *Freeman on Cotenancy*, secs. 199 et seq.; *White v. Sayre*, 2 Ohio, 112; *Robinett v. Preston*, 2 Rob. (Va.) 278; *Gates v. Salmon*, 35 Cal. 588; 95 Am. Dec. 139; *Stark v. Barrett*, 15 Cal. 370; *Barnhart v. Campbell*, 50 Mo. 599.

It is manifest that the mortgage executed by appellee's devisor, and under which the appellants claim title to the whole allotment made to him out of his father's lands, is neither a conveyance of the mortgagor's interest in all the lands of his ancestor, for it is in terms confined to "real estate lying in Perry County," nor of the entirety in the lands so situated, for it conveys only "all the interest of the said William M. Phillips, as heir and distributee of William S. Phillips, deceased," therein. Giving to these limitations the effect which their terms naturally and reasonably enforce, there remains but one possible field of operation for the

granting clause of the conveyance. It passes, not one seventh of all the lands, — the effect of which, upon division, would be to vest in the mortgagee title in severalty to whatever part falls to William M. Phillips, — and not the entirety of the Perry County lands, — which would operate to vest any part of that tract which is allotted to the mortgagor in the mortgagee, — but the interest of one of seven heirs in the tract of 320 acres lying in Perry County, and that interest alone became vested in the mortgagee, as a tenant in common with the other co-tenants. William M. Phillips still owned and held, wholly unaffected by the mortgage, an undivided one-seventh interest in each of the parcels lying in Dallas County: *Williams College v. Mallett*, 12 Me. 398; *Randall v. Mallett*, 14 Me. 51.

The grant was not enlarged or extended by the subsequent partition and allotment to William M. Phillips of more than one seventh of the Perry County land, in consideration, so to speak, for his surrender of his interest in the Dallas County lands. If he had exchanged other property, lying in Dallas County or elsewhere, — property which did not come to him through his father — for the excess over the one seventh in the Perry lands, it would scarcely be insisted that the land thus coming to him by exchange or purchase would pass under the mortgage. And his interest in the Dallas lands was palpably as foreign to his conveyance to Howze, as wholly excluded from its terms, as such other property would have been. The excess over his aliquot share allotted to him in the Perry lands was therefore not only not embraced in his grant to Howze, but it was not vested in him by way of substitution for any land or interest in land which was so embraced.

Nor do we conceive that any different result will flow from an invocation of the principles of warranty. It may be conceded, indeed we entertain no doubt, that the mortgage contains or imports a covenant of warranty. Our statute attaches to its language, "grant, bargain, sell, and convey," *prima facie* the force and effect of a general warranty; and there is nothing in the instrument inconsistent with or repugnant to the meaning which the statute thus gives them: Code, sec. 1839. But we do not understand that the office of a warranty can ever be to extend a grant to lands not embraced in its terms. Its office, in cases like this, is to perfect the grantee's title to the land embraced in the conveyance,

by drawing to him any title which the grantor subsequently acquires to that particular land, and not to vest in the grantee title to lands not covered by the conveyance. Its precise effect here was to vest in Howze the title which Phillips acquired by the decree of partition in one seventh of the 320-acre tract lying in Perry County, which, before partition, had been held by Phillips as co-tenant with his brothers and sisters, and not to extend this title to the whole allotment made to the mortgagor: *Nolen v. Gyon*, 16 Ala. 725; *Carter v. Chaudron*, 21 Ala. 72; *Loomis v. Riley*, 24 Ill. 307; *Williams College v. Mallett*, 12 Me. 298; *Randall v. Mallett*, 14 Me. 51.

The court below construed the mortgage in consonance with these principles, and its rulings in this regard are free from error.

If the sale and purchase by the mortgagee be treated as a valid foreclosure of the mortgage, vesting in the purchaser the land conveyed, as perhaps it should be when reference is had to the doctrine of ratification by the devisee of the mortgagor, its effect was to make appellant Howze and appellee tenants in common of the tract of land sold. It is one of the well-settled general principles pertaining to this relation, that notice to one co-tenant of facts affecting the common property is not notice to the other or others, and the latter's estate will in no way be prejudiced nor the assertion of their rights precluded thereby: *Freeman on Cotenancy*, secs. 173 et seq. This principle is applicable to notices required by statute to be given to the owners of land of proceedings to subject it to sale for the payment of taxes, and a sale made without such notice to all of the co-tenants is void: *Thurston v. Miller*, 10 R. I. 358.

Under the statute in force at the time of the tax sale relied on in this case, notice of the proceeding in the probate court to condemn land to sale for the payment of taxes was required to be served on the owner. Without such notice, the court acquired no jurisdiction, and its judgment of condemnation and consequent sale was void. The proof in this case was clear that this notice was not served on Mrs. Dew, one of the co-tenants in this land; and no title, at least as against her, passed by the sale to the appellant: *Riddle v. Messer*, 84 Ala. 236.

Whether, even had the proceedings in the probate court been in all respects regular, and its decree valid, one tenant in common, under the facts of this case, should be allowed to

set up against his co-tenant the title he acquired through the tax sale, otherwise than as a basis for contribution to the amount thus paid for the common benefit, is open to grave doubt, which the exigencies of this appeal do not require us to decide: *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Brown v. Hogle*, 30 Ill. 119; *Picot v. Page*, 26 Mo. 398; *Wright v. Sperry*, 21 Wis. 331; *Matthews v. Bliss*, 22 Pick. 48.

On the other hand, if the fact that the mortgagee became the purchaser at his own sale under the mortgage be considered to have defeated foreclosure,—as doubtless it would, in the absence of ratification,—it was still a mortgage as to him at the time of the tax sale, and he, being in possession under it, could not acquire a tax title which would be good against the mortgagor or his devisee: *Johnston v. Smith*, 70 Ala. 108; *Bailey v. Campbell*, 82 Ala. 342; *Blake v. Howe*, 1 Aiken, 306; 15 Am. Dec. 684, and note. So that it is, we think, clear from any point of view that the tax sale passed no title to the appellant Howze which can be relied on to defeat appellee's recovery.

The only other exceptions insisted on by the appellants go to the correctness of the circuit court's rulings on the issue, whether the debt secured by the mortgage had been paid at the time of the sale under it. The jury, in confining plaintiff's recovery to five sevenths of the land sued for, must, of necessity, have found this issue in favor of the defendants, as otherwise it would have been their duty, under the charges which the court gave, to have returned a verdict for the entire tract. It is manifest, therefore, that if the court committed error in its rulings on this inquiry, they were lacking in that element of injury to the appellants, without which error is never available to reverse: *Thomason v. Gray*, 82 Ala. 291; *Eufaula v. Simmons*, 86 Ala. 515; *Campbell v. Lunsford*, 83 Ala. 512.

The judgment of the circuit court is affirmed.

TAX SALES — WHO MAY ACQUIRE TITLE THEREAT. — The general rule is, that a mortgagee cannot acquire a tax title and set it up against his mortgagor: *Mills v. Tubey*, 22 Cal. 373; 83 Am. Dec. 74.

Where no trust relation exists between a mortgagor and his mortgagee, the latter may purchase the mortgaged premises at a tax sale: *Beckwith v. Seborn*, 31 W. Va. 1. A mortgagor cannot strengthen his title by purchasing at a tax sale: *Barnard v. Wilson*, 74 Cal. 512. A tax title cannot be acquired by a junior mortgagee to defeat a senior mortgage: *Frank v. Arnold*, 73 Iowa, 370. As to who may acquire title at a tax sale, see note to *Blake v. Howe*, 15 Am. Dec. 684-690.

BOLLING v. KIRBY.

[90 ALABAMA, 215.]

CONDITIONAL SALE — PAYMENT AND RESCISSION THEREOF. — Where a note is given in payment for a sewing-machine, the title to which is to be held by the seller until the payment of the note, which is left with a third party authorized to receive cattle in payment and to surrender the note, and after such surrender the cattle are claimed by the execution creditors of the maker of the note, who thereupon redelivers the note to the third person, under agreement that it shall be considered that no payment has been made, the title to the machine is thereby reinvested in the seller upon his ratification of the transaction, although the third party had no authority except to receive payment of the note and to surrender it.

CONVERSION — WHAT CONSTITUTES. — An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion. It is not essential to conversion sufficient to support the action of trover that the defendant should have the complete manucaption of the property.

CONVERSION — WHAT CONSTITUTES. — Where, under a conditional sale of a sewing-machine, the seller, upon default in payment, demands the machine from the purchaser's wife, the purchaser himself having left the state, and her father unconditionally refuses to allow the seller to take possession of the machine, this will amount to a conversion; but if such refusal is based on a disputed question of payment, and upon an agreement that the father is to have time to ascertain if payment has been made, and if it has not, to surrender the machine, then he is not guilty of conversion, although in the mean time the original purchaser returns and removes the machine without his knowledge or consent.

CONVERSION CANNOT BE BASED ON POSSESSION RETAINED BY AGREEMENT until demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed.

CONVERSION, TO SUSTAIN TROVER, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right, or a withholding of possession under a claim of title inconsistent with the title of the owner.

CONVERSION UPON WHICH TROVER MAY BE BASED must be a positive tortious act. Non-feasance or neglect of legal duty, or mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action.

CONVERSION. — BAYLER UNDERTAKING TO CARRY PROPERTY TO THE OWNER, but failing to do so, whereby it is subsequently lost while in his possession, through no positive misconduct of his, is not liable for conversion. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him.

CONVERSION. — ONE HAVING NOTICE of the claim of the true owner, and who delivers the property to another person, or permits him to take it out of his possession, whereby it is lost to the owner, is liable for its value in trover.

CONVERSION. — **BARE POSSESSION OF PROPERTY**, without some wrongful act in the acquisition of possession, or in its detention, and without any illegal assumption of ownership, or illegal use or misuse, is not a conversion for which trover will lie.

TROVER by Kirby and Brother, a partnership, against W. Bolling to recover for the conversion of a sewing-machine. On the trial, it appeared from the testimony of Kirby that on September 7, 1885, the plaintiffs sold to T. Bishop and his wife a sewing-machine, taking their joint note for the price, payable on November 15, 1885, and retaining the legal title in themselves until payment was made; that when the machine was delivered, it was agreed between the parties that young cattle would be taken in payment, and this was indorsed on the note; that about the time that the note became due he went to Bishop's house, and upon being told by Mrs. Bishop that Mr. Bishop had the cattle, he left word for him to bring them to a place called Guntersville, at which place he authorized one A. R. Hooper to receive the cattle, and left the note with him to be delivered to Bishop. Hooper testified that Bishop came to him in Guntersville a few days after he was given the note, and said that he had brought the cattle to pay it; that they then went to where the cattle were standing in the street; that he agreed to take the cattle, and handed Bishop the note; that two of the latter's creditors immediately claimed the cattle under a mortgage lien; that Bishop then gave them the cattle, handing the note back to the witness, saying that he had more cattle, and would bring them and pay the note; that witness had not taken charge of the cattle, tried to drive them away, nor taken any control over them. Kirby then testified that during the fall of 1886 he went to the residence of Bishop and wife to get the machine, as the note had not been paid; that he found that they had removed, Mrs. Bishop having gone to the home of defendant Bolling, who was her father, her husband being absent in another state; that he went to defendant's house and demanded the machine; that Mrs. Bishop claimed that the machine had been paid for in cattle, and that defendant refused to allow him to take the machine, as it was paid for, and belonged to Mrs. Bishop; that after some further conversation between them, defendant Bolling agreed to go to Guntersville and ascertain if witness had a right to take the machine, and if so, he would have nothing further to do with it; that they met in that town the next day, when defendant said

he was ready to deliver the machine; that witness told defendant to deliver it to one Winston, and that he had never received it. Winston testified that he agreed to receive the machine at the request of the parties; that defendant agreed then and afterwards to send the machine, but failed to do so, and subsequently informed witness that Bishop had moved his family away, and had taken the machine with him. Judgment for plaintiffs, and defendant appealed.

Lusk and Bell, for the appellant.

McCLELLAN, J. We do not doubt that the title to the machine involved in this action remained in the plaintiffs below, under the contract put in evidence, until the purchase-money thereof was paid. In considering the question whether the transaction between Hooper and Bishop was a payment, it may be admitted that Hooper was the special agent of plaintiffs to receive cattle in payment, and to deliver up the paper, and that he did so receive the cattle and deliver up the paper, as that, without more, the debt was satisfied; and it may be further conceded that he had no authority to enter into an arrangement with Bishop by which creditors of the latter, having a lien of some sort on the property, were allowed to take the cattle, and the note was handed back to him by Bishop, and the satisfaction thereof obviated and expunged, so to speak. Yet we do not doubt that Bishop had full authority to make this arrangement, and that the lack of power to this end in Hooper was cured by the ratification of his unauthorized act in this behalf by his principals, the present plaintiffs. The note did not bind the wife: 2 Brickell's Digest, 98; *Walker v. Struve*, 70 Ala. 167. Under the facts of the case, the delivery of the cattle in payment of the note was no more than an exchange of that property for the machine, vesting title to the machine in the husband alone; and this, even had the cattle belonged to the wife, of which there is no proof: *Woods v. Dunlap*, 73 Ala. 169; *Kennon v. Dibble*, 75 Ala. 851. The title thus being in Bishop alone, it was entirely competent for him to agree that the payment which had so vested it in him should be considered as not having been made, and that it should revest in Kirby and Brother; and this agreement he must be held to have made, by handing the note back to Hooper, in consideration of the cattle being applied to another debt owed by him. The rulings and instructions of the court on this part of the case were free from error.

It is not essential to a conversion which will support the action of trover that the defendant should have the complete manucaption of the property. An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion: *Freeman v. Scurlock*, 27 Ala. 407; *Conner v. Allen*, 33 Ala. 515. Hence it is not important that when Kirby went to the residence of the defendant to demand the machine, it was not in his possession, strictly speaking, but in that of Mrs. Bishop, who then lived on his premises, if the defendant interfered to prevent, and did prevent, the plaintiff from then taking possession of it by the unqualified assertion of a title inconsistent with the plaintiffs', and an unconditional refusal to allow the plaintiffs to take the property away. Whether the defendant had the possession in himself or not, such intermeddling, in defiance of plaintiffs' right, was a conversion. But if there was a *bona fide* controversy as to whether payment had been made; and if the defendant, while asserting payment, and predicated his right to prevent a removal of the property on title in Bishop springing out of payment, recognized the controversy and uncertainty as to whether payment had been made, and declined to allow the machine to be removed until the truth of that matter could be ascertained; and if it was thereupon agreed between him and Kirby that he should go to Guntersville the next day, and satisfy himself about it, and that if he found the note had not been paid, the property should be surrendered to the plaintiffs, — these facts would not constitute a conversion. Such a qualified and conditional refusal by Mrs. Bishop would have been reasonable and justifiable under the circumstances, and would not have afforded any evidence of a conversion by her; and the interference of Bolling in her behalf stands upon the same footing: *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Butler v. Jones*, 80 Ala. 436. In such case the plaintiffs are held to have assented to the retention of possession by Mrs. Bishop, pending the investigation agreed on, and no action for conversion can be predicated on a possession so retained until a demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed: *Voltz v. Blackmar*, 64 N. Y. 646; *Finch v. Clark*, Phill. (N. C.) 335.

Conversion which will sustain trover must be a destruction

of the plaintiffs' property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right; or a withholding of possession under a claim of title inconsistent with the title of the owner: *Glaze v. McMillan*, 7 Port. 279; *Gray v. Crocheron*, 8 Port. 191; *Freeman v. Scurlock*, 27 Ala. 407; *Conner v. Allen*, 33 Ala. 515; *Thweat v. Stamps*, 67 Ala. 96; *Central R. R. etc. Co. v. Lampley*, 76 Ala. 357, 368; 52 Am. Rep. 334; *Tinker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345; *Burroughs v. Bayne*, 5 Hurl. & N. 296; *Fauldes v. Willoughby*, 8 Mees. & W. 539; 2 Greenl. Ev., sec. 642. It is immaterial whether the conversion or appropriation be for the benefit of the defendant or of a third person. "The true inquiry is, Does the defendant exercise a dominion over the property in exclusion or defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use": Cooley on Torts, 448; *Liptrot v. Holmes*, 1 Ga. 381-391.

Conversion upon which recovery in trover may be had must be a positive, tortious act. Non-feasance or neglect of legal duty, mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action: *Sturges v. Keith*, 57 Ill. 451; *Bailey v. Moulthrop*, 55 Vt. 17; *Rodgers v. Hine*, 2 Cal. 571; 56 Am. Dec. 363; *Ragsdale v. Williams*, 8 Ired. 498; 49 Am. Dec. 406. A bailee is not liable in trover for a loss of property through larceny from him, or because of negligence resulting in its destruction: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166. If the bailee undertakes to carry the property to the owner, and fails to do so, and it is subsequently lost while in his possession, through no positive misconduct of his, he is not liable for conversion: *Farrer v. Rollins*, 37 Vt. 295. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him: *Jones v. Hodgkins*, 61 Me. 480. And if, having notice of the claim of the true owner, he delivers the property to another person, or permits another to take it out of his possession, whereby it is lost to the plaintiff, he is liable for its value in this form of action: *Dearborn v. Union Nat. Bank*, 58 Me. 273; *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209.

Each of the several charges given by the court below at the request of the plaintiffs is supported by one or another of the principles we have announced. Only one of them is objectionable in any respect, and that not in such sort as will work a reversal. Charge No. 6 is argumentative, in that it directs that the jury may look to certain testimony, etc., as determining whether defendant had control of the property; but while the charge might have been refused on this ground, the giving of it is not a reversible error: *Birmingham F. Brick Works v. Allen*, 86 Ala. 185.

Of the charges asked by the defendant, the first and tenth direct a verdict for the defendant, if the jury believe the evidence. We suppose these charges, as also charges 5, 7, and 9, were requested on the theory that the cattle transaction, to which reference has been had, was a payment of Bishop's note, and operated a divestiture of plaintiffs' title. This position, as we have seen, is untenable, and it follows that charges 1, 5, 7, 9, and 10 were properly refused. Charge No. 4 is bad, in that it required the jury to find that Bolling had not converted the property, although they should believe that when Kirby demanded it from Mrs. Bishop, Bolling interfered, and unqualifiedly and unconditionally refused to allow him to remove it, and by these means prevented its removal. Charge No. 6 would have defeated a recovery, unless the jury believed Bolling converted the machine to his own use, when he would have been, as we have seen, equally liable for a conversion to the use of Bishop or Mrs. Bishop, or for a delivery to either of them, if he had possession or control of it after notice of plaintiffs' claim. Charge No. 8 is open to the same infirmity as No. 6, and moreover is misleading, at least in its requirement of evidence of possession in the defendant, since the jury might thereby have been induced to the conclusion that his intermeddling with the property while in strictness the possession was in Mrs. Bishop was not a conversion, although it was in one aspect of the evidence a palpable dominion over it to the exclusion of plaintiffs' rights.

The defendant also requested the following charge: "If the jury find from the evidence that all the defendant did in reference to the machine was to move it, with his daughter, to a house on his place, and come to town to make inquiry as to what was the truth as to the payment of the note given by Bishop for the machine, and that he allowed his daughter, Mrs. Bishop, to remain in a house on his place, and that the

machine was afterwards carried away by Bishop, one of the makers of the note, this would not make him guilty of a conversion of the sewing-machine, and the verdict of the jury should be for the defendant." This charge was refused, and an exception reserved. As we read the evidence, every fact it hypothesizes is based on testimony in the case. It is therefore not abstract. It presents the defendant's aspect of the case, not upon a part of the testimony, but on all of it. The jury are not restricted in determining whether they will believe the facts hypothesized to the evidence in behalf of the defendant, but they are directed to consider the whole evidence, and if upon that consideration they find these facts to be true, they must find for the defendant. If the charge asserts a correct proposition of law, therefore, it should have been given: *Alexander v. Wheeler*, 78 Ala. 167; *Munkers v. State*, 87 Ala. 84. Our opinion is, that the charge asserts a sound principle of law. If the facts stated were found to exist by the jury, the only act the defendant did in connection with the property was in conservation of it,— he gave it shelter,— a "kindness to the owner, done without any intention of injury to the thing, or of converting it,— an act perfectly consistent with the right of the owner and his dominion over it": *Conner v. Allen*, 33 Ala. 515; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 850. And though he thus gave shelter to the property, it was as property, the possessory right, at least, to which was in Mrs. Bishop; and on these facts he never disturbed her possession, or acquired any possession in himself, that would have authorized or enabled him to have prevented the removal of the machine by Bishop. The charge ought to have been given. So ought charge No. 2. The bare possession of property, without some wrongful act in the acquisition of possession, or in its detention, and without illegal assumption of ownership, or illegal user or misuser, is not a conversion: *Glaze v. McMillan*, 7 Port. 297.

For the errors committed in refusing to give the two charges last considered, the judgment of the circuit court is reversed, and the cause remanded.

CONVERSION OF PERSONALTY SUFFICIENT TO SUSTAIN TROVER — DEFINITION. — Conversion of personal property takes place whenever a person who is neither the owner nor entitled to the possession exercises dominion or control over it inconsistent with or in defiance of the rights of a person who is either in possession or entitled to the immediate possession thereof: *Fuller v. Taber*, 20 Me. 519; *Liptrot v. Holmes*, 1 Ga. 331; *Gilman v. Hill*, 36 N. H. 311; *West*

Jersey R. R. Co. v. Trenton etc. Co., 32 N. J. L. 517; *Bristol v. Burt*, 7 Johns. 254; *Murray v. Burling*, 10 Johns. 172; *Reynolds v. Shaler*, 5 Cow. 323; *Chambers v. Lewis*, 28 N. Y. 454; *Boyes v. Brockway*, 31 N. Y. 490; *Reid v. Colcock*, 1 Nott & McC. 592; 9 Am. Dec. 729; *Allen v. Crary*, 10 Wend. 349; 25 Am. Dec. 566; *Heald v. Carey*, 11 Com. B. 977; 16 Jur. 197; 21 L. J. Com. P. 97; *Rogdale v. Williams*, 8 Ired. 498; 49 Am. Dec. 406; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310; *Marshall v. Harrison*, 8 Ga. 61; 52 Am. Dec. 385; *Baker v. Wheeler*, 8 Wand. 505; 24 Am. Dec. 66; *Hale v. Ames*, 2 T. B. Mon. 143; 15 Am. Dec. 150; *Goell v. Smith*, 128 Mass. 238. Conversion has been defined as a dealing by a person with chattels not belonging to him in a manner inconsistent with the rights of the true owner: *Velsam v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; *Ramsby v. Bentley*, 11 Or. 51. The word "owner," as here and elsewhere used in connection with the law of conversion, does not necessarily signify the person in whom the title to the property is vested, for there are instances in which persons who are not owners may recover for a conversion of chattels: *Nicholls v. Bastard*, 1 Tyrw. & G. 156; 2 Crompt. M. & R. 659; 1 Gale, 295; *Jeffries v. G. W. Ry Co.*, 5 El. & B. 862; 2 Jur., N. S., 250; 25 L. J. Q. R. 102; *Roberts v. Wyatt*, 2 Taunt. 268; and in which he who is their owner may not recover therefor. Conversion is an offense against the possession; and a recovery therefor may be had by him who was either in possession or entitled to the immediate possession of the property when the conversion was committed, and by no other person. Hence if the owner was neither in possession nor entitled to the immediate possession of his property when it was converted, whatever his other remedies may be, he cannot recover in trover for the conversion: *Gordon v. Harper*, Term Rep. 9; 2 Esp. 465; *Owen v. Knight*, 4 Bing. N. C. 54; 6 Dowl. P. C. 245; 5 Scott, 367; *Braxley v. Copley*, 1 Com. B. 686; 9 Jur. 599; 14 L. J. Com. P. 222; *Pain v. Sheriff of Middlesex*, Ryan & M. 99; *Middleworth v. Sedgwick*, 10 Cal. 392; *Swift v. Moseley*, 10 Vt. 208; 33 Am. Dec. 197.

"Whoever undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner, is, in contemplation of law, guilty of a conversion": *Watt v. Potter*, 2 Mason, 77. 'A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own': 2 Greenl. Ev., sec. 642. But the use, or disposition, or detention of a thing that 'might be a tort under one circumstance might, if done under others, assume a different appearance'; as, for example, if the use, disposition, or detention was to do a kindness to the owner, and without any intention of injury to the thing, or of converting it to the use of the person using, disposing of, or detaining it, and was merely conservative of it, and perfectly consistent with the right of the owner and his dominion over it: 2 Greenl. Ev., sec. 643; *Drake v. Shorter*, 4 Esp. 165; *Sparks v. Purdy*, 11 Mo. 219; *Watt v. Potter*, 2 Mason, 77; *Glover v. Riddick*, 11 Ired. 582; *Dent v. Chiles*, 3 Stew. & P. 383; 26 Am. Dec. 350; *Conner v. Allen*, 35 Ala. 516. Hence where the act relied upon as a conversion consisted of the bottling of a large quantity of wine, and there was evidence that it was likely to suffer injury if not bottled, the bottling was adjudged not to be necessarily a conversion, and it was left for the jury to determine from the whole evidence whether a conversion had taken place or not: *Phillips v. Kelley*, 4 Nev. & M. 611; 3 Ad. & E. 106; 11 Har. & W. 134.

"In the sense of the law of trover, a conversion consists either in the ap-

appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim inconsistent with his own: 2 Saund., Patterson and Williams's ed., 47 h; 2 Greenl. Ev., sec. 642. Lord Holt's general definition of a conversion, in *Baldwin v. Cole*, 6 Mod. 212, is, that it is 'the assuming upon one's self the property in and right of disposing of another's goods': *Tinker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345.

CONVERSION BY SELLING CHATTELS OF ANOTHER. — If one has undertaken to convert the chattels of another to his own use, or to do any act which, if accomplished, must result in depriving the owner of his property, then clearly the wrong-doer is answerable for a conversion: *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670. Hence one who, without authority, assumes to sell or otherwise dispose of the chattels of another, whether for his own benefit or not, is guilty of a conversion: *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Everett v. Coffin*, 6 Wend. 603; 22 Am. Dec. 551; *Gentry v. Madden*, 3 Ark. 127; *Thompson v. Carrier*, 24 N. H. 237; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 223; *Anderson v. Nicholas*, 28 N. Y. 600.

CONVERSION BY SALE NOT MADE PURSUANT TO AGENT'S, BAILEY'S, OR OFFICER'S AUTHORITY. — Though the person making a sale of the chattels of another might have been authorized to make such sale under certain circumstances, yet if he was not authorized to make the sale at the time or in the manner in which it was made, or to the person who became the purchaser, the act may generally be treated as a conversion: *Bailey v. Colby*, 34 N. H. 29; 66 Am. Dec. 752; *Perkins v. Thompson*, 3 N. H. 144; *Sargent v. Gile*, 8 N. H. 325; *Grace v. McKinnack*, 49 Ala. 163; *Porter v. Foster*, 20 Ma. 391; 37 Am. Dec. 59; *Johnson v. Stear*, 15 Com. B., N. S., 330; 10 Jur., N. S., 99; 39 L. J. Com. P. 130; 12 Week. Rep. 349; 9 L. T., N. S., 804.

A sheriff or constable who has levied upon property under a writ entitling him to sell it in the manner prescribed by law, for the purpose of satisfying the writ, is deprived of the protection of his writ, and made a trespasser *ab initio*, if he abuses his authority, and hence is liable as for the conversion of the property, if he sells it in defiance of a proper claim for its exemption from sale, or if he makes the sale before or after the time at which he was authorized to make it, or at a place different from that designated in the notice of sale, or in the absence of such notice: *Hall v. Ray*, 40 Vt. 576; 94 Am. Dec. 440; *Evarts v. Burgess*, 48 Vt. 206; *Breck v. Blanchard*, 20 N. Y. 223; 51 Am. Dec. 220; *Freeman on Executions*, sec. 302.

A pledgee of personalty may also become liable for its conversion by its sale, though he was authorized to sell to certain persons, or after complying with certain prerequisites, if the sale was made before it was authorized, or was made to one not authorized to purchase, or without complying with some of the prerequisites exacted either by the contract of pledge or by the law applicable to the relation of the parties: *Johnson v. Stear*, 15 Com. B., N. S., 330; 10 Jur., N. S., 99; 33 L. J. Com. P. 130; 12 Week. Rep. 349; 9 L. T., N. S., 804; *Maryland F. I. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248.

CONVERSION BY VENDEE OF PROPERTY SOLD WITHOUT AUTHORITY. — When a sale is made under such circumstances that the seller is guilty of a conversion in making it, the vendee is also guilty of a conversion, if he takes possession of the property pursuant to the sale and exercises any dominion or

control over it: *Cooper v. Willomatt*, 1 Com. B. 672; 9 Jur. 598; 14 L. J. Com. P. 219; *Cundy v. Lindsay*, L. R. 3 App. O. 459; 47 L. J. Q. B. 481; 38 L. T., N. S., 575; 26 Week. Rep. 406. (A recovery may therefore be had against him in an action of trover without any prior demand upon him for the property, though he purchased it in good faith, and paid a full consideration therefor, in the belief that the seller was the owner of the property or had power to sell and dispose of it: *Gilmore v. Newton*, 9 Allen. 171; (85 Am. Dec. 749; *Salus v. Everett*, 20 Wend. 267; (32 Am. Dec. 541; *Sanborn v. Colman*, 6 N. H. 14; (23 Am. Dec. 703; *Freeman v. Underwood*, 66 Me. 229; *Hyde v. Noble*, 13 N. H. 494; (38 Am. Dec. 508; *Velsian v. Lewis*, 15 Or. 539; (3 Am. St. Rep. 184; *McCombie v. Davis*, 6 East, 538; *Galvin v. Bacon*, 11 Me. 29; 25 Am. Dec. 258; *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Trudo v. Anderson*, 10 Mich. 358; *Habe v. Buell*, 50 Mich. 89; *Harpending v. Meyer*, 55 Cal. 555; *Williams v. Merle*, 11 Wend. 80; (25 Am. Dec. 604; *Agnew v. Johnson*, 22 Pa. St. 471; (62 Am. Dec. 303; *Houston v. Dyche*, Meigs, 76; (23 Am. Dec. 130; *Chapman v. Cole*, 12 Gray, 141; (71 Am. Dec. 739; (note in 25 Am. Dec. 605; *Porter v. Foster*, 20 Me. 391; (37 Am. Dec. 59; *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652.) The mere bidding off or purchasing of property at a sale thereof by one who is neither the owner nor authorized by him to make such sale appears not to be, of itself, sufficient to constitute a conversion, unless it is followed on the part of the purchaser by his taking actual or virtual possession of the property, or exercising some other unequivocal dominion or control over it: *Traylor v. Herrall*, 4 Blackf. 317. The courts of New York insist that one who purchases and takes possession of property in good faith cannot properly be treated as a wrong-doer until he has notice of the invalidity of his title, and they will not sustain an action against him by the owner for their conversion, unless the latter has demanded possession or otherwise made his title known, and the demand has been refused, or some other act done in defiance of the owner's title, after its existence was made known: *Gillett v. Roberts*, 57 N. Y. 28; *Ely v. Ehle*, 3 N. Y. 506; *Barratt v. Warren*, 3 Hill, 348.

CONVERSION, THOUGH NO SALE IS MADE. — It is by no means essential to the conversion of chattels that the wrong-doer sell or attempt to sell them, or even that he do any other act calculated to convert them to his own use. Any other exercise of dominion over personalty in defiance of the owner's rights accomplishes the same legal result. Hence one who aids another to take property from its owner, or to withhold possession of it from him in defiance of his rights, is guilty of a conversion, though the act was done without intending to claim any personal benefit or advantage therefrom, and in the belief that it was merely in the way of rendering assistance to one who was entitled either to take or to retain possession of the property: *Baker v. Beers*, 64 N. H. 102; *Coughlin v. Ball*, 4 Allen, 334; *Mead v. Jack*, 12 Daly, 65; *McCormick v. Stevenson*, 13 Neb. 70; *Freeman v. Scurlock*, 27 Ala. 407; *Scott v. Perkins*, 28 Me. 22; 48 Am. Dec. 470.

CONVERSION BY WORDS ALONE. — There may also be a conversion, though there is no moving or seizing of the chattels, and no interference with them except such as consists in words, spoken or written, indicating an intention to claim and exercise dominion over them inconsistent with the rights of their owner, as where an officer had a writ proclaiming a levy upon goods, and threatened to take them away unless a receipt was given for them, and was prevented from so taking them by the giving of such receipt, though he did not touch them: *Wintringham v. Lafoy*, 7 Cow. 735; *Cossack v. Hale*,

23 Wend. 462; *Phillips v. Hall*, 8 Wend. 610; 24 Am. Dec. 108; *Allen v. Orary*, 10 Wend. 349; 25 Am. Dec. 566; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77. Of some of the cases last cited it may be said that the requiring a person to give a receipt for the property was in fact requiring him to hold it for the officer, and therefore was an actual holding by the officer through the receiptor as his agent; but it is not necessary that a person, to be guilty of a conversion, should take actual possession, either in person or by his agent. It is sufficient that, being in a condition to exercise dominion and control over the property, he assumes the right so to do, and the assumption is acquiesced in by the owner or the party in possession at the time the assumption is made: *Bristol v. Burt*, 7 Johns. 254; 5 Am. Dec. 264; *Webber v. Davis*, 44 Me. 147; 69 Am. Dec. 87; *Hall v. Amos*, 5 T. B. Mon. 89; 17 Am. Dec. 42. Therefore, where one who claimed to be entitled to certain hay notified the owner not to remove it, and apparently intended and designed that it should be used by the person in whose possession it was, and by whom it was subsequently used, both were held to be guilty of a conversion, the court, in so deciding, saying: "Any distinct act of dominion wrongfully exerted over another's property in denial of his right, or inconsistent with it, is a conversion. It is not necessary that there should be a manual taking of the property. If the wrong-doer exercises a dominion over it in exclusion or in defiance of the owner's right, whether it be for his own or another's use, it is in law a conversion: Cooley on Torts, 448; 2 Greenl. Ev., sec. 642; *Evans v. Mason*, 64 N. H. 98. 'The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them': Holt, C. J., in *Baldwin v. Cole*, 6 Mod. 212. Although the defendant did not have the possession of the hay after the sale, or the right to control the movements of Bosworth, there was evidence that both understood, after the sale, that Bosworth was authorized by the defendant as vendor to use the hay, and that was a conversion by the defendant. He had sold it for a price to Bosworth. His claiming that he bought it of the plaintiff, and his forbidding the plaintiff to remove it, then in the actual possession of Bosworth, was evidence from which it was competent to find that his purpose was to enable his vendee to consume the hay, and that, for the purpose of this case, its conversion by his vendee, authorized by the vendor, was the act of the vendor. In authorizing and aiding Bosworth to convert it to his own use he became liable to the plaintiff in trover: *Flanders v. Colby*, 28 N. H. 34. When several join in the conversion, trover will lie against either of them: *Pattes v. Gilmore*, 18 N. H. 460; 45 Am. Dec. 385. There was evidence from which it was competent to find a conversion by the defendant": *Baker v. Beers*, 64 N. H. 102.

There is perhaps not an entire accord in the authorities upon the subject of a conversion of chattels by mere words indicating an intention on the part of the speaker to take or to retain possession of them when the property is not in his possession nor under his immediate control when they are uttered. Thus in New York, one who had purchased property from a person having no title was visited at his home, thirty miles distant from the property, by its true owner, who there made a demand for its possession, to which such purchaser replied that he was willing to do what was right; that he did not want any trouble about it; that he would not give it up unless he could get

released from paying the man he bought it of. There was, at the time, nothing to prevent the owner from taking possession of his property where it was. The court held that no conversion had taken place, saying: "It is true that, to constitute a conversion, a manual taking is not necessary, but where words are relied upon, they must be uttered in such circumstances in proximity to the property as to show defiance of the owner's right, — a determination to exercise dominion and control over the property, and to exclude the property from the exercise of his rights": *Gillett v. Roberts*, 57 N. Y. 23.

Though chattels are in the possession of one who claims to be their owner, his assertion of ownership is not a conversion if made to a stranger not in sight of the property, nor in the presence of the owner, nor made with a view to preventing him from taking possession or asserting his rightful dominion and control: *Irtak v. Cloyce*, 8 Vt. 20; 30 Am. Dec. 446.

ILLUSTRATIONS SHOWING VARIOUS MODES OF CONVERSION. — The following acts have, in harmony with the general rules herein stated, been declared to be sufficient evidence of a conversion on the part of the person guilty of their commission: Sawing logs bearing plaintiff's marks, which had become intermingled in a boom with defendant's logs: *Clark v. Nelson Lumber Co.*, 34 Minn. 289; selling under execution chattels of one who is not a party to the writ, whether the chattels were removed or not: *Scudder v. Anderson*, 54 Mich. 122; attaching the property of one person under a writ against another, though there was no manual taking or removal: *Johnson v. Farr*, 69 N. H. 426; *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345; selling the property of another, though the party making the sale never had nor attempted to deliver the possession of the property sold, and there was no evidence whether the purchaser ever took possession or not: *Ramsby v. Beasley*, 11 Or. 49; procuring a certificate of stock to be issued to one not entitled thereto, and then selling it to an innocent purchaser: *Baker v. Wason*, 59 Tex. 140; permitting plaintiff's sheep to become intermingled with defendant's, and then assisting the purchaser of defendant's flock to drive away such flock with plaintiff's sheep therein, knowing that such purchaser intended to convert them to his own use, though he said he would send back and pay for them if any one claimed it: *Allen v. McMonagle*, 77 Mo. 478; taking bonds from a bank in which they were deposited, and sending them out of the state, to be used as collateral security for the debt of the taker, though he intended and expected to have the identical bonds returned to their place of custody: *Commonwealth v. Tenney*, 97 Mass. 50; cutting timber on the lands of another, though it is not carried away: *Sanderson v. Haverstick*, 8 Pa. St. 294; claiming the ownership of property, and by threats preventing the rightful owner from taking possession of it: *Hare v. Pearson*, 6 Ired. 76; *Orocket v. Beady*, 8 Humph. 20; attaching chattels and placing them in the care of a keeper, who, upon demand, refuses to deliver them to their owner: *Bowen v. Sanborn*, 1 Allen, 389; receiving payment, under a claim of right, of a note or security in the possession of the party receiving, but which belongs to another: *Schroepfel v. Corning*, 5 Denio, 235; *Donnell v. Thompson*, 13 Ala. 440; taking possession of premises and letting them, together with the use of chattels thereon, and receiving pay for such use: *Miller v. Plank*, 6 Cow. 665; 16 Am. Dec. 456; delivery by a bailee of a certificate of stock to the officers of a corporation, to be canceled and a new certificate to be issued to another person, though such delivery was induced by a forged order purporting to be signed by the owner: *Hubbell v. Blandy*, 87 Mich. 209; *ante*, p. 154; receiving the transfer of and collecting a promissory note, which the transferee knew had previously been indorsed to another in blank

as collateral security: *Carter v. Lehman*, 90 Ala. 126; treating a special deposit as though it were a part of the general fund of a bank: *Monmouth Bank v. Dunbar*, 19 Ill. App. 558; refusal by innocent purchasers of stolen property to pay the proceeds of a sale thereof to its rightful owner: *McDaniel v. Adams*, 87 Tenn. 756; delivery by agent in payment of his debt of a watch intrusted to him for sale: *Redick v. Coburn*, 68 Me. 170; continuing to use and claim a chattel taken in exchange of a person having no title thereto, after being informed of the title of the owner: *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; unjustifiable refusal by a master to proceed on a voyage, or deliver the cargo to its owners: *Portland Bank v. Stubbs*, 6 Mass. 422; receiving a loan of property, knowing that he who granted the loan was without authority to do so: *Rice v. Clark*, 8 Vt. 100; purchasing and collecting a promissory note, with knowledge of the claim of its owner: *Allison v. King*, 25 Iowa, 56; removal of goods by a purchaser after notice that his vendor held them only as a factor: *Scriber v. Masten*, 11 Cal. 303; refusal by an auctioneer to surrender property upon a demand being made on him by an assignee in insolvency, and proceeding to sell in disregard of such demand, after knowledge of the insolvency: *Millikin v. Hathaway*, 148 Mass. 69; agreement by an agent to hold the goods of his principal for a third person: *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 607; refusal by an officer to deliver upon demand intoxicating liquors seized without a warrant, and detained without legal authority: *Weston v. Carr*, 71 Me. 356.

CONVERSION BY DELIVERING CHATTELS TO ONE NOT THEIR OWNER. — If the holder of goods, as the agent or bailee of another, delivers them to one who claims title adverse to the owner, or who seeks possession of them for the purpose of destroying or devoting them to some use inconsistent with the rights of the owner, the party so delivering them is liable for a conversion: *Savage v. Darling*, 151 Mass. 5; *Hill v. Hayes*, 38 Conn. 532; *Hicks v. Lyle*, 46 Mich. 488; *Hubbell v. Blandy*, 87 Mich. 209; *ante*, p. 154; nor can this liability be avoided by showing that the person to whom the delivery is made was an officer claiming the right to seize the property as such under a writ in his hands, unless in fact the writ authorized the seizure: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; *Kiff v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Edwards v. White L. T. Co.*, 104 Mass. 159; 6 Am. Rep. 213; *Hull v. Boston R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783. If, however, a bailee receives goods from one whom he finds in possession of them, and believes to be their owner or entitled to their possession, and subsequently redelivers them to him in good faith in pursuance of the express or implied terms of the bailment, and without any knowledge of the claims of one who turns out to be their true owner, he is not answerable to the latter for their conversion: *Nelson v. Iverson*, 17 Ala. 216; *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Nanson v. Jacob*, 93 Mo. 331; 3 Am. St. Rep. 531; *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 619; *Ogle v. Atkinson*, 5 Taunt. 759; *Biddle v. Bond*, 6 Best & S. 225; *Hardman v. Willcock*, 9 Bing. 328; *Bates v. Stanton*, 1 Duer, 79; *Metcalf v. McLaughlin*, 122 Mass. 84. Perhaps he may safely return them after having notice of the claims of the owner, if he does so before any demand is made for the possession of the property and without asserting any right of dominion or control over it adverse to the title or inconsistent with the rights of the owner: *Rembaugh v. Phipps*, 75 Mo. 422. A bailee of goods from one whom he knows did not lawfully hold them has also been held not to be liable for letting them be taken out of his possession by the bailor, where he did nothing to withhold possession from the owner, and there is nothing to indicate that he would have withheld such

possession had the owner made any demand upon him therefor: *Loring v. Mulcahy*, 3 Allen, 575. A warehouseman who, when an officer goes to his warehouse with a writ of attachment and demands access for the purpose of levying upon certain goods therein, opens the house and permits, or at least does not oppose, the officer's taking them, has been held not to be guilty of a conversion, though the taking was not authorized. The grounds upon which this decision was placed by the court which rendered it were, that the warehouseman in not impeding the officer in finding or taking the goods, and even in pointing them out to him as the goods he was in search of, did not show any intention to give permission to take the goods, but merely submitted to legal process and to the exercise of authority made by the officer holding it: *Clegg v. Boston S. W. Co.*, 149 Mass. 454; 14 Am. St. Rep. 428.

DELIVERY OF CHATTELS TO ONE FOUND IN POSSESSION OF THEM. — The rule that a bailee is not liable for a conversion in delivering goods to one whom he found in possession of them has, at least in one state, been extended so as to protect one who received goods from another in apparent possession of them, though, in contemplation of law, they were in possession of their owner. A job teamster, being applied to by W. to remove goods which were in the latter's house, did as requested, and delivered them to W. at a place designated by him. The goods in fact belonged to G., who had hired the room and placed them therein, leaving the room neither locked nor fastened. In announcing its decision that the teamster was not guilty of a conversion, the court said: "It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them: *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6. And this would be so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner: *Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84. Upon the precise question raised we have found no direct authority, nor was any cited in the argument; but the principle upon which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because in such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession. The defendant was a job teamster, and to a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances: *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Judson v. Western R. R. Co.*, 6 Allen, 486; 83 Am. Dec. 646. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant, upon well-established authority, would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immedi-

ately taking them into his actual custody by entering the room through the unlocked door, has directed the removal. If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it, and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control: *Gurley v. Armistead*, 148 Mass. 267; 12 Am. St. Rep. 555.

CONVERSION BY ABETTING AND ENCOURAGING A WRONG-DOER. — One may be guilty of a conversion though he does not personally perform any of the acts by which it was consummated, as where he abets and encourages another who makes such conversion, or adopts or approves it after it is made, by taking, using, or consuming the property converted: *Clark v. Whitaker*, 19 Conn. 39; 48 Am. Dec. 160. Therefore a land-owner who, knowing that a house had been wrongfully taken from the land of another, granted permission to the wrong-doer to place it upon his land, and then refused to permit the owner to remove it unless he first paid a sum which was claimed to be due from the wrong-doer, was adjudged to have adopted the original conversion and to be liable therefor: *Jonsson v. Lindstrom*, 114 Ind. 152. There are cases, however, which we are unable to wholly reconcile with the principles just stated, and which appear to proceed upon the ground that, when a conversion has been completed, one who has not participated in it, nor himself taken possession of the property so that he is entitled to restore it to its owner, cannot be held liable for its conversion, though he may have aided the wrong-doer in retaining possession, or have received the proceeds of the property when sold by him. Thus in Maine, where it was claimed that defendant had been guilty of a conversion because he had personally resisted the plaintiff's attempt to take possession of his property, the court said: "The proposition that the use of force by one not having possession of goods to prevent the true owner from obtaining them amounts to a conversion of those goods is not sustained as sound in principle. If the defendant in an action of trover has not possession, actual or constructive, at the time of the demand by the true owner and the refusal by him to deliver the property, and there has been no tortious taking or withholding of the same previously, he cannot restore the chattel, and he is absolved from liability, notwithstanding he may forcibly interpose obstacles in order to prevent the true owner from obtaining the possession sought. And it has been held that when a plaintiff relies only upon a demand and refusal as evidence of conversion by the defendant, he must show that the latter had the power to give up the goods": *Boobier v. Boobier*, 39 Me. 406. In Massachusetts, after goods were attached by an officer, an agreement to which he was not a party was made and carried out, whereby the owners, disregarding the attachment, took the goods, sold them, and paid the proceeds to certain of their creditors. An action was subsequently brought against the creditors, on behalf of the attaching officer, and they were sought to be held liable on the ground that they had assented to the conversion before it was made and had received the benefit thereof, but the court declared that the defendants had not been guilty of any conversion, saying: "In the present case there was no taking of the glass by the defendants, and they never had possession of it. They therefore had not

converted it by detaining it from the plaintiff. Nor would they so have converted it, even if they had forcibly prevented the plaintiff from obtaining possession of it: *Boobier v. Boobier*, 39 Me. 409, 410. His remedy in that case must have been sought in some other form of declaration. Not only was there no wrongful taking or detaining of the glass by the defendants, but there was no illegal assumption of the ownership of it, nor any illegal using or misusing of it by them, which constitutes a conversion. They merely suffered the glass company to sell it on an agreement that the company should pay to them the proceeds of the sale, and afterwards received those proceeds. If the defendants had themselves sold the glass, the sale would have been a conversion of it by them, if the plaintiff's attachment was valid; but their suffering others over whom they had no control to convert it by a sale was not a conversion by them. 'To support an action of trover,' says Heath, J., 'there must be a positive tortious act': *Bromley v. Coxwell*, 2 Bos. & P. 439": *Polley v. Lennox Iron Works*, 2 Allen, 182.

Unless a party can be held to have adopted a conversion made by another, either in receiving the benefit of it or by aiding, abetting, or encouraging it when made, he cannot be made answerable for it on the ground that he merely suffered or did not resist it: *Leonard v. Tidd*, 3 Met. 6; *Dufield v. Miller*, 92 Pa. St. 286; *Traylor v. Hughes*, 88 Ala. 617.

INTENT OF WRONG-DOER, WHEN MATERIAL.—It is perhaps difficult to reconcile what is said in the different decisions as to the effect to be given to the intention of the defendant, in determining whether or not he has been guilty of a conversion. There are doubtless cases asserting that the innocence of his intent is immaterial, and others absolving him from liability because of such innocence. The true rule is, or at least should be, that his intent should be taken into consideration when his act is otherwise equivocal. If one sells the chattels of another without authority so to do, the act is necessarily a conversion, and cannot be made any the less such by proving that the wrong-doer had purchased them of another in good faith, or believed himself to be their owner, or acted in good faith as the agent or servant of one whom he supposed to be the owner: *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; *Robinson v. McDonald*, 2 Ga. 116; *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174; *Kimball v. Billings*, 55 Me. 147; 92 Am. Dec. 581; *Levi v. Booth*, 58 Md. 305; *Branch v. Planters' L. & S. Bank*, 75 Ga. 242; *Lahner v. Hertzog*, 23 Ill. App. 308; *Thacher v. Moors*, 134 Mass. 156; *Seel v. Zell*, 63 Md. 356; *Cerkel v. Waterman*, 63 Cal. 34; or uses or sells property which had come into his possession through the innocent mistake of his agents or servants: *Lee v. McKay*, 3 Ired. 29. In all of these cases there is no doubt that the property has been appropriated to the use of the defendant, and that he intended to so appropriate it, and all that can be said in his favor is, that both his intention and his act resulted from his innocent ignorance of the rights of the true owner. This, while sufficient to protect him from any claim for exemplary damages, does not otherwise deprive the owner of the goods of any legal remedy for their wrongful use or disposition. A purchaser of property from one not authorized to sell it, who takes possession and exercises dominion over it under a claim of right, appropriates it to his own use, though the appropriation may be less irrevocable than if he had sold it and received the proceeds: *Hollis v. Fowler*, 44 L. J. Q. B. 169; 7 H. L. Cas. 757. He is therefore generally, but not universally, regarded as guilty of a conversion, though no demand upon him has been made by the true owner: *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Omaha and Grand S. & R. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185; *Ward v. Car-*

son *River Wood Co.*, 13 Nev. 44. So if any other interference with the chattels of another results in their loss or destruction, this is a conversion, though the interference was occasioned by mistake: *Platt v. Tuttle*, 23 Conn. 233; *Tobin v. Deal*, 60 Wis. 87; 50 Am. Rep. 345. Hence a conversion results from the cutting of grass on the lands of another, though the cutting was unintentional in the sense that it was done in ignorance of the location of the boundary lines: *Donahue v. Shippee*, 15 R. I. 453.

An innocent person cannot be held liable for a conversion, if his act can be justified as having been in any manner authorized by the owner of the property. Therefore if a baker orders flour of K. and H., who, in turn, buy of G. to fill such order, and the warehouseman with whom the flour was stored delivers to K. and H. flour which belonged to M., and K. and H. deliver it to the baker, who uses it, the warehouseman cannot maintain trover against the baker therefor. "In this case," the court said, "when the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it, as is warranted by the authority thus given: *Strickland v. Barrett*, 20 Pick. 415; *Burbank v. Crocker*, 7 Gray, 158; 66 Am. Dec. 470. In this case the plaintiffs delivered the flour to Kemble and Hastings as the flour purchased by them from Greenough. Against the plaintiffs, therefore, the delivery to Kemble and Hastings, and the sale by them to the defendant, was an authority to him to treat it as his own. That it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it with knowledge of the mistake: *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739. But they cannot take advantage of their own mistake to convert into a tort that which has been done in good faith, in pursuance of authority given by themselves": *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216.

Though the intention of a wrong-doer is not to claim any right of property in chattels, or to the possession thereof, or to obtain any benefit from them, he may become answerable for converting them if he abuses them, or by his unlawful and unauthorized dominion over them occasions them to be lost to the owner, as where, after finding cattle trespassing on his premises, he first turns them into a public highway, and then drives them for a great distance, or in a direction opposite to the owner's residence, whereby they are lost to him: *Knowl v. Wagoner*, 16 Ind. 414; *Gilson v. Fisk*, 8 N. H. 404; *Knott v. Degges*, 6 Har. & J. 230; *Tobin v. Deal*, 60 Wis. 87; 50 Am. Rep. 345.

Where, on the other hand, though there is some interference with the chattels of another without his authority, they are not sold, lost, destroyed, nor otherwise appropriated to the use of the wrong-doer, his intention may properly be taken into consideration in determining whether there has been a conversion: *Fouldes v. Willoughby*, 8 Mees. & W. 540; 1 Dowl., N. S., 86; 5 Jur. 534. Thus if a landlord wrongfully resumes possession of a leased room, and, as part of such act, takes chattels of the tenant from the room and removes them to another part of the building, in no way denying the right of the tenant to his property, nor hindering him from taking it whenever he wishes, no conversion is committed: *Mattice v. Brinkman*, 74 Mich. 705. And generally, whenever a person claims property, real or personal, and, incidental to the exercise of the right claimed by him, he removes or otherwise interferes with the chattels of another, without claiming any right to them or to their possession or control, and without depriving their owner

of them, or of his possession or control of them, he is not liable for their conversion, though his claim of title or right in the other property was unfounded: *Shea v. Milford*, 145 Mass. 525; *Farnsworth v. Lowery*, 134 Mass. 512; *Niemets v. St. Louis etc. Ass'n*, 5 Mo. App. 59; *Sparks v. Purdy*, 11 Mo. 219.

Such acts as one may lawfully perform in the exercise of his own rights of property cannot amount to a conversion of the property of another, though they may result in destroying it, or depriving him of the benefit thereof. Hence if the owner of chattels knew that they were on the lands of one who intended to erect a freight-shed thereon, and that a reasonable and necessary prosecution of the work would prevent the subsequent removal of such chattels, he cannot maintain trover because, through his failure to remove them, the construction of the freight-shed has made their removal impossible: *Stackpole v. Eastern Railroad*, 62 N. H. 498; *Aldrich v. Wright*, 53 N. H. 398; 16 Am. Rep. 339.

DEMAND AND REFUSAL AS EVIDENCE OF CONVERSION. — It will be observed that where the intention of the defendant can be successfully urged to exonerate him from a charge of conversion otherwise sustainable, it is not his intention to do no wrong, nor his ignorance that he is doing wrong, which relieves him from liability, but his absence of any intention to use, claim, or dispose of the property, either as his or as the property of some person for whom he is acting, — his freedom from any act inconsistent with or in defiance of the rights of the owner of the property. Hence where a demand for the possession of chattels and a refusal to deliver them are relied upon as evidence of a conversion, the defendant may avoid their effect by showing that his refusal was not in assertion of a claim of right on his part, nor inconsistent with the rights of the owner. Thus if a person in possession of property has a reasonable doubt of the right of the party making a demand on him for such possession, and disclaiming all right on his part, declines to surrender possession until he can ascertain whether he should do so or not, he is not guilty of a conversion: *Zachary v. Pace*, 9 Ark. 212; 47 Am. Dec. 744; *Ingalls v. Bulkley*, 15 Ill. 224; *Fletcher v. Fletcher*, 7 N. H. 452; 28 Am. Dec. 359; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350. "While the law is, that a demand and refusal are generally *prima facie* evidence of a conversion, a qualified, reasonable, and justifiable refusal is not evidence of a conversion. It takes a wrongful refusal to constitute the defendant a tortfeasor, and in the absence of such evidence there can be no conversion. It is well settled that the possessor of goods may refuse to deliver them unless the claimant makes some proper and reasonable show of ownership, which necessarily includes evidence of identification": *Butler v. Jones*, 80 Ala. 436; *Green v. Dunn*, 3 Camp. 216; *Wilde v. Waters*, 16 Com. B. 637; 24 L. J. Com. P. 193; *Philpot v. Kelley*, 4 Nev. & M. 611; 3 Ad. & E. 106; 1 Har. & W. 134; *Varrall v. Robinson*, 2 Crompt. M. & R. 495; 4 Dowl. Pr. 242; 1 Gale, 244; 5 Tyrw. 1069; *Carroll v. Mize*, 51 Barb. 212.

One who has received possession of goods as the agent, bailee, or servant of another may, without being guilty of a conversion, when demand is made upon him for them, decline to deliver them, unless he has had time to ascertain their ownership, or to consult with his principal or bailor; but if after such consultation he relies upon the title of his principal, and refuses to deliver possession, he is liable for a conversion, unless such title is paramount to the rights of the person making the demand: *Singer Mfg. Co. v. King*, 14 R. L. 511; *Lee v. Bayes*, 18 Com. B. 599; *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 618; *Coles v. Wright*, 4 Taunt. 198; *Ward v. Moffett*, 38 Mo. App.

385. A woman who had long been in the possession of a watch died at the house of her brother, after which a demand was made on him for the watch. He replied that the decedent left a will which he would have probated at the earliest moment; that the watch was safe; that he did not feel at liberty to part with its custody until some one was appointed to take charge of her estate. It was decided that the refusal was qualified and reasonable, and therefore did not amount to a conversion of the watch: *Buffington v. Clark*, 15 R. I. 437. If a demand is made by one claiming to act as the agent of another, it may be refused on the ground that he does not present any evidence of his authority: *Watt v. Potter*, 2 Mason, 77; *Taylor v. Spears*, 6 Ark. 381; 44 Am. Dec. 519. Where, however, a party wishes to justify his refusal to deliver property on the ground that he has doubts of the ownership or authority of the person making the demand, he must not make an unqualified refusal, but must show by his response that he does not claim a right to retain the property, and merely desires to act as a prudent man should before delivering up chattels which have been intrusted to his care or into the possession he originally lawfully came: *Dowd v. Wadsworth*, 2 Dev. 120; 18 Am. Dec. 567; *Dent v. Chiles*, 5 Stew. & P. 383; 26 Am. Dec. 350; *Zachary v. Pace*, 9 Ark. 212; 47 Am. Dec. 744; *Ingalls v. Bulkley*, 15 Ill. 224.

A refusal to deliver chattels on demand can never constitute a conversion, if the party on whom the demand is made did not at the time have power to comply therewith, as where they had previously been lost, stolen, or forcibly or otherwise taken from his possession without his assent: *Abraham v. Nunn*, 42 Ala. 51; *Dearbourn v. Bank*, 58 Me. 273; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Hill v. Belasco*, 17 Ill. App. 194; *Davis v. Buffum*, 51 Me. 160; *Yale v. Saunders*, 16 Vt. 243.

As a general rule, a conversion takes place whenever one in whose possession or control personalty is, upon demand being made upon him therefor by a party entitled thereto, makes an unqualified refusal to surrender it: *Doty v. Hawkins*, 6 N. H. 247; 25 Am. Dec. 459; *Dusky v. Rudder*, 80 Mo. 400; *German Bank v. Meadnecroft*, 95 Ill. 124; 35 Am. Rep. 137; *Blackman v. Lekman*, 63 Ala. 547; *State v. Stevenson*, 46 N. J. L. 326; *Southworth Co. v. Lamb*, 82 Mo. 242; *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31; *Jones v. Hunt*, 74 Tex. 657; *Burroughs v. Bayne*, 5 Hurl. & N. 296; 29 L. J. Ex. 188; 2 L. T., N. S., 16; or places his refusal on some untenable ground, or undertakes to exact, as a condition of delivery, the discharge of some lien or other claim for the payment of which the property is not bound: *Cannec v. Spanton*, 8 Scott N. R. 714; 7 Man. & G. 903; 8 Jur. 1008; 14 L. J. Com. P. 23; *Nutter v. Varney*, 64 N. H. 611; *Briggs v. Haycock*, 63 Cal. 343; *Dusky v. Rudder*, 80 Mo. 400; *Wilson v. Anderton*, 1 Barn. & Adol. 450; *Thompson v. Trail*, 9 Dowl. & R. 31; 6 Barn. & C. 30; 2 Car. & P. 334. One cannot escape the consequence of a demand made on him by saying that he neither admits nor denies the claim, that he does not assent to nor forbid the taking of the property, and that both he and the party making the demand are responsible for their acts, and the law will protect them in their rights, and punish them for unlawful acts; and if the demand is thus answered, there is sufficient evidence of a conversion: *Ingersoll v. Barnes*, 47 Mich. 104. A general refusal to surrender chattels may be evidence of their conversion, though part only of them were under the control of the party so refusing: *Ray v. Light*, 34 Ark. 421.

DEMAND AND REFUSAL, WHEN ESSENTIAL TO A CONVERSION. — In many instances a demand and refusal are necessary to the holding of a person in

possession of goods liable for their conversion. Upon principle, this can be true only when no actual conversion has been made prior to such demand, and when, but for such demand, the person on whom it was made would be entitled to continue to hold possession of the property demanded. Hence when a sale has been made of the chattels of another without authority: *Cour- sis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174; *Velsian v. Lewis*, 15 Or. 339; 3 Am. St. Rep. 184; *Haas v. Taylor*, 80 Ala. 459; *Howitt v. Estelle*, 92 Ill. 218; and in every other case in which an actual conversion has already taken place: *Kendrick v. Rogers*, 26 Minn. 344; *Bunger v. Roddy*, 70 Ind. 26; or in which a demand, if made, must have proven idle and unavailing: *Gottlieb v. Hartman*, 3 Col. 53; or in which the taking was at its inception tortious and illegal: *Rhoades v. Drummond*, 3 Col. 374; *Woodbury v. Long*, 8 Pick. 543; 19 Am. Dec. 345; *Farrington v. Payne*, 15 Johns. 431; *Moses v. Walker*, 2 Hilt. 536; *Davis v. Duncan*, 1 McCord, 213; *Jones v. Dugan*, 1 McCord, 428; or in which the possession was procured by duress or fraud practiced on the owner for the purpose of obtaining it: *Foshay v. Ferguson*, 5 Hill, 154; *McCrillis v. Allen*, 57 Vt. 505; *Thurston v. Blanchard*, 22 Pick. 18; *Sterens v. Austin*, 1 Met. 557; *Ryan v. Brant*, 42 Ill. 78; or, though lawfully obtained, the property is misused or abused: *Magwyer v. Hawthorn*, 2 Har. (Del.) 71, — no demand need be made before beginning action for the conversion.

NEGLIGENCE OR NON-FEASANCE CANNOT SUPPORT A CHARGE OF CONVERSION. — If, after a conversion has taken place, the property is lost or destroyed, either through the negligence of the wrong-doer, or the wanton or lawless acts of other persons, the cause of action which arose as soon as the conversion was consummated continues, and a subsequent loss or destruction of the property constitutes no defense to an action for the prior conversion: *Mason v. O'Brien*, 42 Miss. 420. But as a conversion is an appropriation of property to one's use, either actual or constructive, any wrong which does not amount to such appropriation is not a conversion, and while it may entitle the injured person to some remedy, will not support an action of trover. Hence if chattels which were in the possession of a person other than their owner are lost or stolen through want of reasonable care on the part of their custodian, or injured by accident, or through his mere negligence or non-feasance, not accompanied by any misappropriation on his part, he is not answerable for their conversion: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *Dorman v. Kane*, 5 Allen, 38; *Bromley v. Coatsell*, 2 Bos. & P. 438; *Tinker v. Morrill*, 39 Vt. 477; 94 Am. Dec. 345; *Bailey v. Moulthrop*, 55 Vt. 17; *Moses v. Norris*, 4 N. H. 304; *Williams v. Gesse*, 3 Bing. N. C. 849. Even the destruction of a chattel, if done unintentionally, as where the bailee of a draft burns it in destroying other papers which he considered of no value, without asserting any title to it or claiming any right to hold, detain, or destroy it, is not a conversion: *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; 8 Am. Rep. 564.

RESTORATION OF PROPERTY CONVERTED, WHETHER OWNER MAY BE REQUIRED TO ACCEPT. — Whether one who has been guilty of a conversion of chattels may, in effect, revoke such conversion, and compel the owner of the property to submit to its restoration to him, is a question to which no positive answer can be given. There is no doubt that "it has been the well-established rule in the courts of England for more than a century, that in actions of trover, the court will, under certain circumstances, permit the defendant, after suit is brought, to bring the property claimed into court for the plaintiff, with the costs up to that time, and will then order a stay

of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, unless he be able to show that he has been specially damaged by the conversion of the property by the defendant, in addition to its value at the time of its return. Or the court will, in a proper case, after the verdict, upon tender of the property, reduce the verdict to nominal damages": *Churchill v. Welsh*, 47 Wis. 39; *Fisher v. Prince*, 3 Burr. 1364; *Watts v. Phipps*, Bull. N. P. 49; *Earle v. Holderness*, 4 Bing. 462; 1 Moore & P. 254. Even in England the courts have generally declined to interfere if the value of the chattels converted was uncertain, or the plaintiff insisted upon claiming special damages: *Whitten v. Fuller*, 2 W. Black. 902; *Tucker v. Wright*, 3 Bing. 601; 11 Moore, 500; *Gibson v. Humphrey*, 1 Car. & M. 544; 2 Tyrw. 588.

The existence of the English rule has been recognized in several American decisions, and its applicability to cases in our courts apparently conceded, with the qualification that whether the defendant should be permitted to return the property rested in the discretion of the trial court, which discretion is, however, subject to review by the appellate courts: *Rogers v. Crombie*, 4 Me. 274; *Stevens v. Low*, 2 Hill, 132; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Thayer v. Manley*, 8 Hun, 530. Still we cannot ascertain that the rule has been actually enforced except in two cases. In Vermont, defendants into whose possession certain bonds lawfully came, and who withheld them from plaintiffs under a claim of right made in good faith, were permitted to bring them into court in mitigation of damages: *Rutland etc. R. R. Co. v. Bank of Middlebury*, 32 Vt. 639. In a subsequent case in the same state, in which the rule under consideration could not be applied, because the defendant, after notice of the plaintiff's title, and without offering to return the property, sold it, nevertheless the court said: "It would seem, upon principle, that in actions of trover and trespass *de bonis asportatis*, when the taking is not willful and the property is not essentially injured, the defendant should be allowed to surrender back the property, and to pay the actual damage for the taking and detention of it into court, together with the cost of the action already accrued; and in case the plaintiff refused to accept the money paid into court, he must proceed at his peril, insomuch that if at the trial he is nonsuited, or if the jury shall not give him a sum exceeding the money paid into court, he will be obliged to pay the costs of the action. The numerous actions of trover and trespass *de bonis asportatis* growing out of the sale and transfer of personal property, where the vendor had no title, and where, by his false or fraudulent representations, or by some indications of ownership, the vendee was induced to make the purchase, where there was no intentional wrong on the part of the purchaser, and no real damage done by him, require that he should be relieved from the rigor of the rule applicable to cases of willful and malicious trespass. The rule allowing such surrender of the property and payment, in the discretion of the court, is founded in equity, which is 'the correction of that wherein the law (by reason of its universality) is deficient.' It goes upon the principle that when the defendant is ready and willing to pay, and places within the reach of the plaintiff a sum of money equal to the actual debt or damage recoverable by law and the costs already accrued, the action ought not to be further prosecuted at the expense of the defendant": *Bucklin v. Beals*, 38 Vt. 653.

In Wisconsin, the defendants in an action were custodians of several promissory notes, never claiming to own or to have any interest in them, and offering to surrender them if the parties of whom they claimed to be

the bailees would assent. While they were held to have been guilty of a technical conversion in refusing to deliver the notes to their payee, yet they acted in good faith, believing that they had no right to make such delivery, and their refusal to deliver did not occasion any special damages to the plaintiff. After a verdict had been returned against the defendants, they offered to surrender the notes to the plaintiff, and moved that the verdict upon such surrender be reduced to nominal damages. The motion being overruled by the trial court, its action in this respect was reversed on appeal. The opinion of the appellate court shows, however, that the case was an exceptional one, and that the verdict of the jury might well have been set aside on the ground that no conversion had taken place. The following extracts from the opinion show the considerations influencing the final decision: "The question is an open one in this court; and we are disposed to adopt the rule of the English and Vermont courts, in a case like the one at bar, where the defendant holds the property as custodian for the parties in interest, and has never claimed any personal interest in the same, and if guilty of conversion of the same at all, is simply guilty of a technical conversion, through a mistake as to his duty as custodian of the same. It is not a case in which there has been a complete conversion of the property to the use of defendants, and does not come within the reason of the rule of those cases which hold that where there has been such a conversion the defendant cannot mitigate the damages by an offer to return the property. The evidence, we think, clearly establishes the fact that the notes came to the possession of the defendant, either as the agent of the plaintiff solely, or as custodian for both the plaintiff and the maker. It also shows that the defendant made no claim to any ownership of the notes, or to any interest in them; that he offered to surrender them if both parties would agree to the surrender; that, immediately after the action was brought against him, he offered to bring the notes into court, and asked to be relieved of all further responsibility in relation to them; and we think it further shows that his refusal to surrender the notes to the plaintiff upon his demand was made in good faith, believing that he had no right to make such surrender without the consent of the maker, Hartford, and that if he was guilty of any conversion of any of the notes to his own use, it was purely a legal and technical conversion. We are also unable to perceive that the plaintiff suffered any special damage by the refusal of the defendant to deliver the notes on his demand. If any of the notes were due and payable to the plaintiff, and he desired to enforce the payment of them, the fact that they were in possession of the defendant, he not claiming any interest in them, could not hinder the plaintiff from proceeding to enforce their collection, either by action or upon the chattel mortgage. We think great injustice will be done to the defendant if this judgment is permitted to stand. If any faith or credit is to be given to his own testimony, or to the testimony of the two Hartfords, he had at least the right to believe that it was not his duty to surrender the notes to the plaintiff; and although the jury found that he was mistaken in that belief, still, as he, immediately upon being sued, brought the notes into court and asked to be relieved from the further custody of the same, disclaimed all personal interest in them, and stated that his only reason for not delivering them to the plaintiff was because the other party interested in them insisted that he had no right to deliver them to the plaintiff, it would seem most inequitable that he should be compelled to purchase them at their face value, with ten per cent interest added, because of his mistaken belief in this particular. . . . If any defendant who

is sued for a conversion of personal property can be allowed to surrender the property after action brought, this defendant ought to be permitted to do so. As there is no claim made in the plaintiff's complaint that he has suffered any special damages by reason of defendant's refusal to deliver the notes when demanded, nor that there was any depreciation in the value of the notes between the time of their alleged conversion by the defendant and the commencement of this action, or the time of the trial, the return of the notes to the plaintiff would have placed him in as good a position, so far as the evidence on the trial and the verdict of the jury discloses, as though there never had been any technical conversion by the defendant. No injustice would be done by their return to the plaintiff and permitting him to take judgment for nominal damages and costs; whereas great injustice will be done to the defendant by compelling him to pay presently, in cash, a very large sum of money for notes, many of which will not become due for a year or more, and whose real value is a matter of the greatest uncertainty, because he made an honest mistake as to his duty as custodian of them": *Churchill v. Welsh*, 47 Wis. 39.

In no case is one who has converted a chattel entitled to require its owner to permit its restoration if it has deteriorated in value or been essentially injured prior to the offer to restore it: *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Whitaker v. Houghton*, 86 Pa. St. 48. While, so far as we are aware, the right of a defendant who has been guilty of a conversion of chattels to restore them to their owner has not been tested in any of the American courts by any direct proceeding, by motion or otherwise, except in the cases already cited, the emphatic language of the other decisions in which this right has been considered, either directly or incidentally, is such as to convince us that the weight of authority in this country supports the rule that when a cause of action has once accrued to the owner of chattels on account of their conversion by another, the latter can neither destroy it, nor restore the property in mitigation of damages without the assent of the former: *Higgins v. Whitney*, 24 Wend. 379; *Wooley v. Carter*, 7 N. J. L. 85, 11 Am. Dec. 520; *Livermore v. Northrup*, 44 N. Y. 107; *Reynolds v. Shuler*, 5 Cow. 323; *Walker v. Fuller*, 29 Ark. 448; *Hammer v. Wilsey*, 17 Wend. 91; *Stickney v. Allen*, 10 Gray, 352; *Higgins v. Whitney*, 24 Wend. 379; *Norman v. Rogers*, 29 Ark. 365.

RESTORATION ACCEPTED BY OWNER MITIGATES DAMAGES. — If property which has been converted is returned to its owner, who accepts it, this does not destroy the cause of action which arose on the conversion. The injured party is still entitled to maintain an action for the injury, but the return must be considered in mitigation of damages. In other words, the plaintiff's recovery must be limited to nominal damages, and such special damages as he is shown to have suffered from the conversion before the restoration of the property was accepted: *Kelly v. McDonald*, 39 Ark. 387; *Whitaker v. Houghton*, 86 Pa. St. 48; *Murphy v. Hobbs*, 8 Col. 17; *Western Land and Cattle Co. v. Hall*, 33 Fed. Rep. 236; *Norman v. Rogers*, 29 Ark. 365; *Brewster v. Stillman*, 38 N. Y. 423; *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512; *Reynolds v. Shuler*, 5 Cow. 323; *Barreletti v. Bellgard*, 71 Ill. 280; *Walker v. Fuller*, 29 Ark. 448; *Cook v. Loomis*, 26 Conn. 483.

AGENT OR SERVANT'S LIABILITY FOR CONVERSION. — There can be no doubt that one cannot give another an authority which he himself does not possess, and therefore that he who cannot sell, dispose of, or otherwise interfere with chattels without being guilty of their conversion cannot give an auctioneer or other agent authority to do any of such acts: *Loeckman v.*

Machin, 2 Stark. 311; *Stephens v. Elwell*, 4 Maule & S. 259; *Perkins v. Smith*, 1 Wils. 328. Undoubtedly there are cases in which agents act innocently in making conversions of personalty for their principals, and in which there is hardship in holding them personally answerable for acts from which they could reap no benefit, and which they did in good faith, supposing what they did to be within the line of their duty as well as of their authority. In one state it has been said that "we hold the rule of law to be, that an agent or servant who, acting solely for his principal or master, and by his direction, and without knowing of any wrong, or being guilty of any gross negligence in not knowing of it, disposes of or assists the master in disposing of property which the latter had no right to dispose of, is not thereby rendered liable for the conversion of the property": *Leuthold v. Fairchild*, 35 Minn. 100. In the same case it is asserted that there is a conflict in the decisions upon the subject, the cases in New York holding that the conversion is the act of the agent as well as of the master, while those in Massachusetts hold the conversion to be the act of the master alone. No authorities were cited to establish the alleged conflict, and our industry has not enabled us to discover any. On the other hand, all the authorities which have come within our observation affirm that one who has been guilty of an act whereby the chattels of another have been converted cannot evade liability therefor by proving that he acted innocently as the agent of another: *Permynter v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Kimball v. Billings*, 55 Me. 147; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324; *Coles v. Clark*, 3 Cush. 399; *Lee v. Matthews*, 10 Ala. 682; 44 Am. Dec. 498; *Edgerly v. Whalan*, 100 Mass. 307; *McPartland v. Read*, 11 Allen, 231; *Gage v. Whittier*, 17 N. H. 312; *McPheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772; Story on Agency, sec. 312; *Spraight v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Everett v. Coffin*, 6 Wend. 209; 22 Am. Dec. 551; *Fowler v. Hollins*, L. R. 7 Q. B. 606; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwell*, 4 Maule & S. 259.

If an agent is in the possession of goods intrusted to him by his principal, and a demand is made upon him for them by a third person, he is not required to act upon it immediately without any opportunity to consult with his principal, and may therefore, without being guilty of any conversion, decline to surrender possession until he has had such opportunity; but if, either before or after such consultation, he unqualifiedly refuses to surrender possession, he becomes answerable for conversion, unless his principal was entitled to retain such possession: *Singer Mfg. Co. v. King*, 14 R. L. 511; *Lee v. Robinson*, 18 Com. B. 599; 25 L. J. Com. P. 249; *Stephens v. Elwell*, 4 Maule & S. 259; *Mires v. Solebay*, 2 Mod. 242; *Alexander v. Southey*, 5 Barn. & Adol. 247. If an agent purchases chattels from one not authorized to sell them, and his act was previously authorized or subsequently ratified by his principal, the latter is liable for the conversion arising from taking possession of the property pursuant to the sale, though he had no knowledge of the want of authority in the person making the sale: *Hilbery v. Hatton*, 2 Hurl. & O. 822; 33 L. J. Ex. 190; 10 L. T., N. S., 39.

AGENT, WHEN GUILTY OF CONVERTING CHATTELS OF HIS PRINCIPAL. — An agent may unquestionably be guilty of a conversion of the goods of his principal, for which the latter may seek and find redress by an action of trover. Still, this form of action has been pursued with apparent infrequency, and the decisions formulating tests by which to determine whether an agent has been guilty of a conversion are more rare and less satisfactory than one would anticipate before making an attempt to discover and compre-

hend them. Though perhaps a *dictum*, the following statement of the general principle applicable to the subject is as accurate and comprehensible as any to be found in the reports: "The question whether, in any view of the case, this action of trover can be maintained, was discussed at the argument, and as that point may arise on another trial, it will be proper to give it some consideration. The most usual remedies of a principal against his agent are the action of *assumpsit* and a special action on the case, but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some act on the part of the agent, — a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be a departure from his authority before this action for a conversion of the goods can be maintained": *McMorris v. Simpson*, 21 Wend. 614. Therefore an agent is guilty of a conversion if, having no authority to sell the property of his principal, he nevertheless sells it: *Eller v. Bailey*, 8 Pa. St. 442; or having authority to sell it, he exchanges it for other property: *Haas v. Damong*, 9 Iowa, 589; or being intrusted with a note to be sold, and the proceeds to be applied to the payment of a debt of the maker's, he applies it to the payment of a debt due to himself: *Murray v. Burling*, 10 Johns. 172; or being given a note to be sold, with instructions not to let it go out of his reach without receiving the money, he delivers it to another on his promise to get it discounted, and to return the proceeds, and the latter procures such discounting, but appropriates the avails to his own use: *Laverty v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184; or being sent to obtain a note for his principal, he obtains it payable to himself, and disposes of it for his own use: *McNear v. Atwood*, 17 Me. 434; or being an attorney at law, and authorized to collect money due his principal, he collects it and applies it to his own use: *Cotton v. Sharpestein*, 14 Wis. 226; 80 Am. Dec. 774; or being authorized to dispose of a note in a particular manner and upon certain conditions, he disposes of it in a different manner, and in the absence of any of the required conditions: *Badger v. Hatch*, 71 Me. 562; or who, when money is placed in his hands, belonging to his principal, to be loaned in the latter's name, loans it in the name of himself: *Farrand v. Hurlbut*, 7 Minn. 477; or who, when a note is sent to him to sell, with notice that the sender has drawn upon him for the amount of the note, replies that he will not pay the draft, and who, on being notified that he must pay the draft or return the note, sells the note while declining to pay the draft: *Security Bank v. Fogg*, 148 Mass. 273; *National Bank v. Crocker*, 111 Mass. 163; or who, when wheat is given to him to sell when directed by his principal, refuses either to sell or account for the wheat when directed, and retains possession against the wishes of his principal: *Coleman v. Pearce*, 26 Minn. 123.

.. In those cases in which an agent actually uses the property of his principal for his own benefit, or refuses to surrender possession thereof to his principal upon a proper demand therefor, or sells or embezzles it, or refuses to account for the proceeds, there can be no doubt that he in fact has appro-

priated it to his own use, and therefore that he has been guilty of and may be held liable for its conversion. If, however, an agent is negligent or is guilty of mere non-feasance or omission, whereby the property of his principal is lost or injured, while he may be and is liable in some form of action, he is not deemed guilty of conversion, and redress against him must be sought in some other form of action than trover. It appears to be conceded that an agent may disobey instructions in some respects, and thereby deprive his principal of his property, without being guilty of a conversion. The rule which the authorities, or some of them, seemingly sustain upon this subject is, that though the agent departs from or acts in disobedience to his instructions, yet if the act which he does is so far within the limits of the powers conceded to him by his principal that it must be regarded as valid as between the principal and the person to whom the agent sells or disposes of the property, that then the sale or disposition, though it may support an action against the agent for a breach of trust, cannot subject him to liability for a conversion. It is true that the acts to which this rule has been applied seem to us to be no more within the bounds of the agent's powers than were his acts in other instances in which the rule was deemed inapplicable. Thus it has been held that an agent authorized to sell goods, but directed not to sell them on credit, or unless he obtains a specified price, was not guilty of their conversion, but only of a breach of duty, when he sold them on credit, or for a price less than that specified: *Sarjeant v. Blunt*, 16 Johns. 73; *Loveless v. Fowler*, 79 Ga. 134; 11 Am. St. Rep. 407; *Cairnes v. Bleecker*, 12 Johns. 304; *Dufresne v. Hutchinson*, 3 Taunt. 117. So far as we have been able to ascertain, the rule has not been applied except to sales of property made when the agent was authorized to sell, but had violated his instructions by selling for a price less than that authorized by his principal, or upon credit when the latter commanded the sale to be made for cash only. We are not able to comprehend why a sale on credit can be held to be authorized when an agent was directed to sell for cash only, or how authority given him to sell for a price specified can, under ordinary circumstances, authorize him to sell for an entirely different price; and it seems to us that in either event, when he departs from his instructions, he cannot, as between himself and his principal, be regarded as making other than a tortious and unlawful use and disposition of the latter's property, for which redress ought to be given by an action of trover. However this may be, it seems to be conceded that, with the exception of sales made under the circumstances indicated, any use or disposition of chattels by an agent contrary to the instructions of his principal may be treated by the latter as a conversion: *Laverty v. Snethen*, 68 N. Y. 522; 23 Am. Rep. 184; *Syeds v. Hay*, 4 Term Rep. 260; *Hynes v. Patterson*, 95 N. Y. 1; *Badger v. Hatch*, 71 Me. 562. Hence it has been held conversion by an agent, when intrusted with a watch for the purpose of having it appraised by a watchmaker, with a view to procuring a loan thereon, that he permitted it to go out of his possession and to be levied upon under a writ not against its owner: *Spencer v. Blackman*, 9 Wend. 167; or when directed to sell wheat at a specified price on a day named, and if not sold on that day to ship it to New York, he did not sell it on the day designated, but on the day following: *Scott v. Rogers*, 31 N. Y. 676.

A bailee of personalty making a disposition of it not warranted by the contract of bailment becomes thereby guilty of its conversion: *Loescham v. Mechin*, 2 Stark. 311. Hence an agent is answerable for a conversion of a chattel, whether intrusted to him for the purpose of selling it or not, when

he pledges it as collateral security for his own debt: *State v. Berning*, 74 Mo. 87; *Birdsall v. Davenport*, 43 Hun, 552; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658; *Nichols v. Gage*, 10 Or. 82; *Hall v. Corcoran*, 107 Mass. 251; 9 Am. Rep. 30; or exchanges it for other property: *Ainsworth v. Partillo*, 13 Ala. 460; *Atkinson v. Jones*, 72 Ala. 248; or sells it, in the absence of authority so to do, whether such want of authority results from the fact that no power of sale existed under any circumstances, or from the failure to comply with some condition precedent to the existence of that power: *Rosenzweig v. Fraser*, 82 Ind. 342; *Sanborn v. Colman*, 6 N. H. 14; 23 Am. Dec. 703. Though a bailee has an interest in property in his possession which he may rightfully transfer, as where he is its lessee, or holds it under a conditional purchase, yet if he makes an absolute, unqualified transfer, his act is inconsistent with the owner's title, and is a conversion: *Swift v. Moseley*, 10 Vt. 208; 33 Am. Dec. 197; *Sims v. James*, 62 Ga. 260.

BAILER, WHEN GUILTY OF CONVERSION. — A bailee, though he does not sell the property in his care nor part with its custody, may be adjudged guilty of its conversion when he misuses or abuses it. Manifestly there may be some misuse or abuse of property for which a guilty party will not be answerable as for its conversion, but it is difficult, and perhaps impossible, to formulate any test by which to determine what abuses are conversions and what are not. It seems to be certain, however, that a misuse or abuse which the owner of property is entitled to treat as its conversion must be intentional, and inconsistent with the respective rights of the bailee and bailor expressed in or implied by their contract of bailment. A loan by a bailee of railway bonds in his custody to one who agrees to return them upon request has been held to make both the borrower and the lender liable for their conversion: *Branner v. Branner*, 1 Lea, 101. It has also been held that a conversion occurs when an agister of cattle uses them without authority: *Gove v. Watson*, 61 N. H. 136; and when a hirer of a horse or vehicle to be driven to a particular place drives it beyond that place, or in a different direction from it: *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Lucas v. Trumbull*, 15 Gray, 306; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 300; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500. But to warrant the holding of a bailee for a conversion, the act done by him must be intentional, and inconsistent with the contract of bailment. Hence, though he hired a horse to go to and return from a particular place, yet if, in returning, he innocently got upon the wrong road, and after discovering his error took what he believed to be the best way back, he did not thereby convert such horse, though the way chosen was circuitous, and led through another town: *Spooner v. Manchester*, 133 Mass. 270; 43 Am. Rep. 514. Neither can he be held for a conversion where the alleged abuse consisted of an omission, though such omission was stipulated against in the contract of bailment, as where he procured a horse to go and return from a place without stopping, but stopped half-way to see a friend, and during the stoppage put the animal in a stable to be fed: *Evans v. Mason*, 64 N. H. 98.

COMMON CARRIER, WHEN GUILTY OF CONVERSION. — If a bailee has possession of chattels as a common carrier, his mere non-feasance cannot render him liable for a conversion, as where the property is lost through his negligence, or he fails to transport or deliver it within a reasonable time: *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Robinson v. Austin*, 2 Gray, 564; *Bowlin v. Nye*, 10

Cush. 417; *Briggs v. New York etc. R. R. Co.*, 28 Barb. 515; but if he does any affirmative act inconsistent with the rights of the owner of the property, the effect is different: *Dench v. Walker*, 14 Mass. 499. It has been held that if a carrier, instead of going the ordinary route, adopts an extraordinary one, and while out of such ordinary route the property intrusted to him is lost, he is answerable for its conversion: *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227. If, when possession of property is demanded, he unqualifiedly refuses to deliver it: *Lockwood v. Bull*, 1 Cow. 322; 13 Am. Dec. 539; *Packard v. Getman*, 4 Wend. 613; 21 Am. Dec. 166; *McEntee v. New Jersey S. Co.*; 45 N. Y. 34; 6 Am. Rep. 28; or falsely asserts that it is not in his possession: *Louisville etc. R'y Co. v. Lanson*, 88 Ky. 496, — he becomes liable for its conversion. A like liability arises when he delivers it to a person not entitled to it: *Erie Dispatch v. Johnson*, 87 Tenn. 480; *Sword v. Young*, 89 Tenn. 126; *Weyand v. Atchison etc. R'y Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504; *Cumlin v. Boston & L. R. R. Co.*, 7 Allen, 341; *Hawkins v. Hoffman*, 6 Hill, 33; 41 Am. Dec. 767; *Merchants' D. Co. v. Merriam*, 111 Ind. 5; *Youl v. Harlow*, 2 Peake, 49; *Deveraux v. Barclay*, 2 Barn. & Adol. 702; *Stephenson v. Hart*, 4 Bing. 476; 1 Moore & P. 357; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28; though such person is an officer claiming a right to take it under process then in his hands: *Keff v. Old Colony R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Gibbons v. Furwell*, 63 Mich. 344; 6 Am. St. 301; *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774. Because a carrier is under obligation to deliver to the proper person, and is answerable for a misdelivery, he cannot be treated as guilty of a conversion, though he has refused to make delivery to the party entitled thereto, if, under the circumstances, the refusal was qualified and reasonable, and made on the ground that the person making the demand had not supported it by sufficient evidence of his ownership of the property, or of his right to the possession thereof: *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28.

MORTGAGOR OR MORTGAGEE, CONVERSION OF CHATTELS BY. — When chattels are mortgaged, any disposition of them inconsistent with the rights either of the mortgagor or the mortgagee, by whomsoever made, may be treated as a conversion, as where the mortgagee sells before condition broken: *Below v. Mitchell*, 26 Mich. 500; or after he has sold sufficient of the chattels to discharge the mortgage debt then due: *Brink v. Freoff*, 40 Mich. 610; 44 Mich. 69; or a second mortgagee sells chattels without discharging the claims of the prior mortgage: *Kleinberger v. Brown*, 8 N. Y. Sup. 966. A mortgagor, while he continues in possession and entitled to possession, has an interest in the property which he may transfer, or which may be seized in satisfaction of his debts; and no transfer or seizure which recognizes the rights of the mortgagee and is not inconsistent with them can be treated by him as a conversion: *Heflin v. Slay*, 78 Ala. 180; *Harbison v. Harrell*, 19 Ala. 753; *Hathaway v. Brayman*, 42 N. Y. 322; 1 Am. Rep. 524. On the other hand, any sale, or seizure, or detention of possession in defiance of the mortgagee's rights, whether by the mortgagor or any other person, is a conversion for which the mortgagee is entitled to redress by an action of trover: *Millar v. Allen*, 10 B. L. 49; *Ashmead v. Kellogg*, 23 Conn. 70; *Coles v. Clark*, 3 Cush. 299; *Leonard v. Hair*, 133 Mass. 455; *Black v. Howell*, 56 Iowa, 630; *Jorgenson v. Tait*, 26 Minn. 327; Freeman on Executions, sec. 177.

CO-TENANT, WHEN GUILTY OF CONVERSION. — A part-owner of a chattel may be guilty of a conversion of the interest of his co-owner, and, upon principle, the test by which to determine whether he has been so guilty or

act is the same as in other cases, though the difficulty in applying it is greater. A conversion, whether the wrong-doer is a part owner of the chattel converted or not, is some use or disposition of it in defiance of or inconsistent with the rights of the true owner. A part owner of a chattel is entitled in many respects to make the same use of it, when in his possession, as if he were an owner in severalty; and such uses as he may lawfully make and such dominion as he may lawfully exercise cannot be inconsistent with the rights of his co-owner, and the latter cannot therefore treat them as a conversion of his interest. A part owner of a chattel is entitled to remain in its exclusive possession, and to use it exclusively while in such possession, in any ordinary and proper mode of using it, and therefore is not liable in trover or otherwise to his co-tenant for such possession or use: *Freeman on Cotenancy*, sec. 306; *Gilbert v. Dickerson*, 7 Wend. 449; 22 Am. Dec. 592; *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235; *Farr v. Smith*, 9 Wend. 338; 24 Am. Dec. 162; *Kilgore v. Wood*, 56 Me. 150; 96 Am. Dec. 440. If, however, such possession and use are maintained and continued under a denial that his co-tenant has any interest whatever in the property, and a claim that the possessor is its owner in severalty, then it has been held that a conversion takes place: *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Potter v. Neal*, 63 How. Pr. 158. So where chattels were of a peculiar character and susceptible of one use only, a part owner who took and maintained exclusive possession, neither using them himself or permitting their use by his co-tenant, was adjudged to be guilty of their conversion: *Agass v. Johnson*, 17 Pa. St. 373; 55 Am. Dec. 565.

If chattels owned in co-tenancy are of such a character that a division of them can be made by each part owner taking a quantity thereof proportionate to his interest, without any possibility of such division being unfair, as where money, or wheat, or other grain is held in common, he has a right to make such division, and to sever and take his share, and any prevention of the exercise of this right is a conversion: *Loddell v. Stowell*, 51 N. Y. 70; *Dahl v. Fuller*, 50 Wis. 501; *Fiquet v. Allison*, 12 Mich. 330; 86 Am. Dec. 54; *Webb v. Mann*, 3 Mich. 139; *Stall v. Wilbur*, 77 N. Y. 158. A like result follows when a co-tenant, who has agreed to take the common property to a designated place for the purpose of there dividing it, takes it to a different place, and claims to have succeeded to the interest of his co-tenant under the contract of purchase: *Ripley v. Davis*, 15 Mich. 75; 90 Am. Dec. 202.

No co-tenant has any right to destroy the subject-matter of the co-tenancy, or to put it to any use which must preclude all further enjoyment of it by his co-tenant, or to mingle it with other property so that its identity is lost and cannot be restored, or to so injure or expose it to peril that it must become either lost or worthless, and therefore each of these acts, because it is inconsistent with the interest of another part owner, may be by him treated as a conversion: *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52; *Freeman on Cotenancy*, secs. 312-318; *Tubbs v. Richardson*, 6 Vt. 442; 27 Am. Dec. 570; *Guyther v. Pettiford*, 6 Ired. 388; 45 Am. Dec. 499; *Lowe v. Miller*, 3 Gratt. 205; 46 Am. Dec. 188; *Redington v. Chase*, 44 N. H. 36; 82 Am. Dec. 189; *Cowan v. Buyers*, Cooke, 53; 5 Am. Dec. 668.

A part owner of a chattel may undoubtedly sell his interest therein, and transfer to his vendee all the rights possessed by himself before the sale, but he has no power to act for his co-tenant, or to sell or transfer any interest in excess of his moiety. He may, however, undertake to sell the entirety. If he does so, his act is inconsistent with the title of his co-owner, and, upon principle, should be regarded as an unlawful conversion of the latter's inter-

est. Such a majority of the American cases upon the subject declare it to be: *Dyckman v. Valiente*, 42 N. Y. 560; *Dain v. Cowing*, 22 Me. 347; 39 Am. Dec. 585; *Carr v. Dodge*, 40 N. H. 403; *Yamhill B. Co. v. Newby*, 1 Or. 173; *Coursin's Appeal*, 79 Pa. St. 220; *Warren v. Aller*, 1 Pinney, 479; 44 Am. Dec. 406; *Low v. Miller*, 3 Gratt. 213; 46 Am. Dec. 188; *Rains v. McNairy*, 4 Humph. 358; 40 Am. Dec. 651; *Person v. Williams*, 25 Minn. 189; *Wheeler v. Wheeler*, 33 Me. 347; *Perminter v. Kelly*, 18 Ala. 716; 54 Am. Dec. 177; *Nowlen v. Colt*, 6 Hill, 461; 41 Am. Dec. 756; *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235; *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501; *Hutchinson v. Chase*, 39 Me. 508; 63 Am. Dec. 645; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470; while the English decisions and those of a few of the American states deny that a sale by a part owner can be a conversion of the interest of his co-tenant, unless accompanied by peculiar circumstances resulting in the loss of the property to the latter: *Sanborn v. Merrill*, 15 Vt. 700; 40 Am. Dec. 701; *Welch v. Clark*, 12 Vt. 681; 36 Am. Dec. 368; *Pitt v. Petway*, 12 Ired. 73; *Rooks v. Moore*, 1 Busb. 1; 57 Am. Dec. 569; *Barton v. Williams*, 5 Barn. & Ald. 403; *Mayhew v. Herrick*, 7 Com. B. 229; 13 Jur. 1078; 18 L. J. Com. P. 179; *Morgan v. Marquis*, 9 Ex. 145; *Brady v. Arnold*, 19 U. C. C. P. 46; Freeman on Cotenancy, sec. 309.

PERSONALTY WHICH MAY BE CONVERTED. — Every species of personal property which is subject to ownership, and over which another than the owner can exercise dominion or control in defiance of or inconsistent with the owner's rights, may, when such dominion or control is so exercised, be regarded as converted: *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68. Hence an action of trover may be sustained for the conversion of money or bank bills: *Moody v. Keener*, 7 Port. 218; promissory notes and other evidence of indebtedness: *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Day v. Whitney*, 1 Pick. 503; *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; *Griswold v. Judd*, 1 Root, 221; *Compere v. Burr*, 5 Blackf. 419; *Brickhouse v. Brickhouse*, 11 Ired. 404; *Otisfield v. Mayberry*, 63 Me. 197; *Stone v. Olough*, 41 N. H. 290; *Penniman v. Winner*, 54 Md. 127; contracts for the sale of land and other property: *Hasswell v. Courten*, 45 N. Y. Sup. Ct. 22; certificates of the stock of corporations: *Kingman v. Pierce*, 17 Mass. 247; *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80; *Neller v. Kelley*, 69 Pa. St. 403; *Budd v. R. R. Co.*, 12 Or. 271; 53 Am. Rep. 355; *Daggett v. Davis*, 53 Mich. 35; 51 Am. Rep. 91; copies of accounts: *Fullam v. Cummings*, 16 Vt. 697; *O'Donoghue v. Corby*, 22 Mo. 394; writs of execution: *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71; and fixtures, which, either from their character, mode, or annexation, or the agreement of the parties, remain personal property: *Smith v. Benson*, 1 Hill, 176; *Osgood v. Howard*, 6 Greenl. 452; 20 Am. Dec. 322; *Harris v. Powers*, 57 Ala. 139; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Korbe v. Barfour*, 130 Mass. 255; *Powers v. Harris*, 68 Ala. 409; *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532; *Hilthorne v. Brown*, 12 Me. 162; *Brown v. Wallis*, 115 Mass. 156; *Crippen v. Morrison*, 13 Mich. 23; but it is said that such an action is not sustainable for the conversion of judgments or other records: *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412; *Cobb v. Cornegay*, 6 Ired. 358; 45 Am. Dec. 497. The fact that the property alleged to have been converted has no value except to its owner will not defeat an action for its conversion: *Pierce v. Gilson*, 9 Vt. 216; *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188. Where a bond, note, or other evidence of indebtedness is, after its payment, seized, detained, or transferred by a person having no right so to do, when it is no longer capable of being asserted as a cause of action, some

of the cases have regarded it as so extinguished by the payment as no longer to be the subject of conversion: *Besherer v. Swisher*, 3 N. J. L. 748; *Todd v. Crookshanks*, 3 Johns. 432; *Lowremore v. Berry*, 19 Ala. 130; 54 Am. Dec. 188; *Platt v. Potts*, 11 Ired. 266; 53 Am. Dec. 412. While, in other cases, any wrongful disposition of a paid note or bond has been adjudged to amount to its conversion as against the maker, who by such payment becomes entitled to its possession: *Stone v. Clough*, 41 N. H. 290; *Otisfield v. Mayberry*, 63 Me. 197; *Neal v. Hanson*, 60 Me. 84; *Buck v. Kent*, 3 Vt. 99; 21 Am. Dec. 576; *Spencer v. Dearth*, 43 Vt. 98. If a note is founded upon illegal considerations, the payee cannot sustain an action for its conversion: *Morrill v. Goodenow*, 65 Me. 178; nor can such action be maintained in any instance when the thing converted is such that it was unlawful and criminal for the plaintiff to have it in his possession, as where it is a counterfeit coin, or an implement designed to aid in the making of such coin: *Spalding v. Preston*, 21 Vt. 9; 50 Am. Dec. 68.

ROACH v. PRIVETT.

[90 ALABAMA, 391.]

JUDGMENTS — MERGER — FOREIGN JUDGMENT. — A judgment appealed from is merged in a judgment of affirmance on appeal. This rule applies in a suit on a judgment of affirmance rendered in another state.

JUDGMENTS — MERGER BY AFFIRMANCE — JURISDICTION. — When the judgment sued on was affirmed on appeal, and the defendant submitted himself to the jurisdiction of the appellate court, he cannot assail it on the ground that the trial court never acquired jurisdiction of his person. This rule applies to affirmed judgments of other states.

JUDGMENTS — CONCLUSIVENESS OF, AS AGAINST SET-OFF. — A set-off may or may not be pleaded, at the election of the defendant; and if not pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense to another action by the same plaintiff, is not affected or impaired by a judgment against the defendant. This rule applies to a suit on a judgment rendered in another state, in the absence of proof that a different rule prevails there.

PRACTICE — ERROR WITHOUT INJURY IN EXCLUSION OF EVIDENCE. — When evidence is erroneously excluded, the rule of error without injury cannot be invoked, on the ground that the ruling was made after all the evidence on that point had been adduced, and that the evidence was insufficient.

JUDGMENTS. — PAROL EVIDENCE OF JUSTICE'S JUDGMENT rendered during a former term of office is not admissible on proof of search in his office for his docket and papers, and in the absence of proof that he has been in office continually since the judgment was rendered, or has succeeded himself after being out one or more terms.

William L. Martin and J. E. Brown, for the appellant.

Hunt and Clopton, for the appellee.

McCLELLAN, J. The judgment sued on was rendered by the supreme court of Tennessee on appeal from a circuit

court of that state, and is not only an affirmance of the latter judgment, but is also, in terms, an original judgment in the appellate court, with order for execution out of that court for the amount there adjudged to be due. In the absence of proof of any law in Tennessee to the contrary, we must intend not only that the judgment of the appellate tribunal is in accordance with the law of that state, but that it is the only judgment in force in the case in which it was rendered: *Hassell v. Hamilton*, 33 Ala. 280. Especially so as this ruling is in harmony with our own decisions as to the merger of judgments appealed from into judgments of affirmance on appeal: *Dane v. McArthur*, 57 Ala. 448; *Werborn v. Pinney*, 76 Ala. 291.

The special plea of the defendant below was an attempt to impeach the judgment sued on, by showing that the *nisi prius* court which rendered the judgment appealed from, and which had thus merged into the judgment of the supreme court, was without jurisdiction; but it disclosed that the defendant had prosecuted the appeal, and submitted himself to the jurisdiction of the appellate tribunal. We concur with the circuit judge that this was fatal to the plea. It showed that the court which rendered the judgment sued on, the only subsisting judgment in this cause, had jurisdiction of the defendant, whatever may have been the fact in this regard as to the primary court. The defendant could not thus invoke the jurisdiction of the appellate court, and speculate on the chances of its favorable action, without being bound and precluded by whatever judgment should be rendered in the exercise of that jurisdiction. If he desired to avoid this result, and at the same time draw in question the jurisdiction of the primary court, his remedy was a writ of error *coram vobis*, under which it was open to him to show that the trial court had never acquired jurisdiction of his person, either by service of summons or attachment of his property. In that proceeding, upon a proper showing, the judgment below could have been expunged. Such is the course of the common law, which, in the absence of anything to the contrary, we are bound to presume obtains in Tennessee: *Stephen's Pleading*, *119; *Day v. Hamburgh*, 1 Browne (Pa.), 75. But as he elected to hazard the rendition of a valid judgment against him by taking an appeal on a record which did not disclose the jurisdictional infirmity of which he complains, he cannot be heard to object that the judgment thus rendered in a pro-

ceeding instituted by him was void because of the absence of service on him in the primary court. The demurrer to the special plea was therefore properly sustained.

Our opinion is, that the circuit court erred in excluding from the jury the evidence offered by the defendant in support of the set-off claimed by him against the judgment debt. This ruling appears to have proceeded on the theory that as the alleged counterclaims, or items of set-off, antedated the Tennessee judgment, and could have been pleaded in that action, the rendition of that judgment forecloses and precludes them. This view finds some support in some of our earlier cases: *Crawford v. Simonton's Ex'rs*, 7 Port. 110; but it is unsound in principle, and cannot be reconciled with later adjudications. The settled doctrine of this court now is, that a set-off may or may not be pleaded, at the election of the defendant, and that unless it is pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff, is in no wise affected or impaired by a judgment against the defendant: *Wharton v. King*, 69 Ala. 865; *Weaver v. Brown*, 87 Ala. 533. And this is in harmony with the ruling in other jurisdictions: *Freeman on Judgments*, secs. 277-280. What the law in this regard is in Tennessee we are not advised by anything in this record, and we cannot look elsewhere to ascertain it: *Johnson v. State*, 88 Ala. 176. In the absence of evidence on this point, the presumption is, that the common law controls the question in that state; and at common law a set-off cannot be pleaded at all: *Waterman on Set-off*, sec. 10; *White v. Governor*, 18 Ala. 767. And hence, of course, a counterclaim not a matter of recoupment could not have been made an issue in the case, nor concluded by the judgment therein.

It is contended, however, that the error, if any, committed by the trial court in excluding evidence of set-off was without injury, in that the defendant failed to sustain the plea, the ruling of the court having been made after all the testimony on this point had been adduced. We cannot pass upon the sufficiency of the evidence on any controverted issue of fact. That question is for the determination of the jury. If there was any evidence, however weak and inconclusive it may have been, tending to support defendant's plea of set-off, the error in excluding it cannot be said to have involved no injury to him, as we cannot know what

effect it would have had on the minds of the jury. That there was such evidence, the record before us clearly demonstrates.

Parol evidence of the judgment rendered by the justice of the peace should not have been received, on the showing made. It should, at least, have been made to appear that the justice had been in office continuously since its rendition, or that he had succeeded, after being out one or more terms, to the same justiceship which he held at the time of the judgment. Otherwise there is no presumption of loss or destruction of the papers, or the judgment entry, from a failure to find them or it in his office at the time of the search proved. *Non constat* but that the docket on which the judgment entry was made had, as required by law, been delivered to another justice, and never returned to the magistrate who rendered the judgment.

For the error pointed out above, the judgment of the circuit court is reversed, and the cause remanded.

ERROR. — Errors are presumptively prejudicial, and one claiming them to be harmless must show their innocuous character: *Dayhara v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 901.

SECONDARY EVIDENCE, WHEN ADMISSIBLE. — Before secondary evidence of the contents of a writing can be received, it must be shown to have existed, to be lost or destroyed, to be without the jurisdiction of the court, or to be in the possession of the adverse party, who refuses to produce it, and that the party offering the secondary evidence has searched for and used all reasonable diligence to procure the original: *Wiseman v. North Pacific R. R. Co.*, 20 Or. 425; 23 Am. St. Rep. 135, and particularly note. This rule applies to records of courts: *Warfield's Will*, 22 Cal. 51; 83 Am. Dec. 49; *Pruden v. Alden*, 23 Pick. 184; 34 Am. Dec. 51; *Lyon v. Bolling*, 14 Ala. 753; 48 Am. Dec. 122, and note; *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456, and note.

SET-OFF, WHEN NEED NOT BE PLEADED BY DEFENDANT. — A defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace: *Morton v. Bailey*, 1 Scam. 213; 27 Am. Dec. 767. Compare the cases collected upon this question in note to *Woodruff v. Garner*, 89 Am. Dec. 492. A defendant having failed to set off a cross-demand in an action, he is not thereby precluded from availing himself thereof at another time: *Weaver v. Brown*, 87 Ala. 533.

COMPTON v. HANKINS.

[30 ALABAMA, 411.]

WATERS — RIGHT OF NAVIGATION AND RIPARIAN RIGHTS. — A navigable river is public, but its banks are private property, and the right to use the stream as a highway, and the right to land for the purpose of receiving and discharging freight and passengers, are distinct, so that those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank at other places than a public landing, for the purpose of loading or unloading vessels, without the consent of the owner, except in cases of peril or necessity.

WATERS — RIGHT TO MAINTAIN PRIVATE LANDING. — Riparian owners have the right to construct private wharves and landings on navigable streams, subject to the public right of navigation. The owner has the same dominion and power to control such landings as any other private property, and to possess and use the same to the exclusion of the public. Hence the right to raft timber does not imply or carry with it the right to deposit or store logs or timber upon such private property preparatory to its being rafted.

WATERS — PUBLIC AND PRIVATE WHARF. — If a wharf or landing on a navigable stream is public, the owner is under obligation to concede to others the privilege of landing their goods. If it is private, he has the exclusive right to its use and enjoyment, or to permit such parties to use it as he sees proper.

WATERS — WHARF, WHETHER PUBLIC OR PRIVATE. — Whether or not a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if at the terminus of a public highway, practically forming a part thereof, or if it has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing.

WATERS — PRIVATE WHARF, WHAT CONSTITUTES. — The right to erect a wharf or landing on a navigable stream having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property. The public may acquire an easement or right to the use of such landing by dedication on the part of the owner of the soil; but its use by individuals, with the permission of the owner, does not give the public the right to use it without his consent; and its use by the public, with his permission, for a number of years, and for his own emolument, will not amount to a dedication.

WATERS — PRIVATE WHARF — RIGHTS OF OWNER. — The objects for which a private landing on a navigable stream may be held and used may be public without affecting its private character. In such case there is an implied license to vessels to use it for receiving and discharging freight and passengers; and also to all persons to occupy it for lawful and customary purposes; but the owner may at any time revoke the license as to the entire public, or withhold permission from particular vessels or persons.

WATERS — PRIVATE WHARF — RIGHTS OF OWNER. — The owner of a private landing or wharf may prohibit its use for storing and keeping of timber to be rafted, which may obstruct free access to and from vessels.

George W. Taylor, for the appellant.

Taylor and Johnston, for the appellee.

CLOPTON, J. The action is brought by appellant to recover damages alleged to have been sustained by the refusal of defendant, who, the complaint avers, is the keeper and owner of a public warehouse and landing on the Tombigbee River, a navigable stream, to receive at the landing for shipment pine timber tendered by plaintiff, or to permit him to deposit the same at the landing, preparatory to being rafted by the river to market. The complaint avers that defendant had the means of receiving the timber, and that plaintiff was ready and offered to pay a proper reward therefor. It is obvious that the *gravamen* of the action is the refusal of defendant to permit the use of the landing for the safe-keeping and storage of the timber until it could be rafted, not the violation of any right incident or appurtenant to the right of navigation. The demurrer to the complaint, which was sustained by the court, involves the inquiries, What are the rights of the public in respect to the use of the landings, and what the duty of defendant in regard to the storage of timber?

While the authorities are not in entire harmony in reference to the respective rights of navigators of public streams above the ebb and flow of the tide, and of riparian owners, the better opinion seems to be, that the right to the use of the stream as a highway, and to land for purposes of receiving and discharging freight and passengers are distinct, and those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank for the purpose of loading or unloading vessels, without the consent of the owner, unless in cases of necessity. In *Washburn on Easements*, 554, the author observes: "In regard to the right to land upon other points of the banks of a navigable stream than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it becomes unavoidable that one should make use of the bank for landing upon, or fastening his craft in the prosecution of his passage." In *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644, it is said: "The river being public, and its banks being private, it is not difficult to discover the true foundation of those riparian rights known as wharf rights. It is essential to the successful prosecution of his business that the

navigator shall make frequent landings to lade and unlade, to receive and discharge passengers, and to receive supplies. But except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage."

Riparian owners have claimed and exercised the right to construct wharves and landing-places on navigable streams from the earliest settlement of this country, subject to the limitation that the public easement or servitude is not impaired. The owner has the same dominion and power to control such landing-places as any other private property, and to possess and use the same to the exclusion of the public. The right to raft timber does not imply or carry with it the right to deposit upon private property preparatory to being rafted. Campbell, J., says: "The right to raft logs down the stream does not involve the right of booming them upon private property for safe-keeping and storage, any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores": *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435. The plaintiff has no common-law right to store or deposit logs or timber at a private landing for the purpose of rafting.

The plaintiff, however, bases his right to recover on the alleged ground that the landing is public. Wharves or landings may be either private or public in their nature. If public, the owner is under obligations to concede to others the privilege of landing their goods; if private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway, and practically forms a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded a public wharf or landing. The right to erect a landing on a navigable stream having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property: *Wharf Case*, 3 Bland, 361. It is well settled that the public may acquire an easement, a

right to the use of such landing, by dedication on the part of the owner of the soil. But use by individuals, with the permission of the owner, does not give the public the right to do the same without his consent. Use by the public, with his permission and for his own emolument, for no number of years will amount to dedication.

In *Post v. Pearsall*, 22 Wend. 425, after an elaborate consideration of the question, it was held that the public have not the right, against the will of the owner, to use and occupy the land adjoining navigable waters, as a public landing and place of deposit of property, in its transit to and from vessels navigating such waters, although such user has been continued upwards of twenty years, with the knowledge of the owner. In *O'Neill v. Annett*, 27 N. J. L. 290, 72 Am. Dec. 364, the action was brought to recover damages for the defendant's refusal to permit vessels to discharge a cargo of coal upon his wharf. The declaration alleged that it was a public wharf, and the jury so found. The wharf was built by defendant at his own expense more than twenty years previously. A public turnpike passed or terminated near the wharf, but it does not appear that it extended to the landing, or that there was any connection between them, except that the public passed and repassed from one to the other without interruption. During the whole period of its existence, vessels had been in the habit of loading and unloading at the wharf, and it had been used by persons in the vicinity as a place of deposit for lumber, wood, brick, and other materials, the owner being paid for such use. It was ruled that the wharf was private property, and that the consent of the owner must be obtained before the public have a right to use it. It is said: "It is difficult to conceive of evidence that could more clearly negative the idea of dedication to public use, or more satisfactorily establish the fact that the proprietor was using the property for his own private emolument."

The objects for which a private landing may be held and used may be public, without affecting its private character. In such case there is an implied license to vessels navigating the stream to use it for receiving and discharging freight and passengers, and also to all persons to occupy it for lawful and accustomed purposes; but the owner may at any time revoke the license as to the entire public, or withhold permission from particular vessels or persons: *Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295; *Steele v. Sullivan*, 70 Ala. 589. The

fair inference is, that a landing on a navigable river is intended for the loading or unloading of the craft navigating the river, and as the place of deposit of such freight as they usually transport. The owner is authorized to prohibit the use of a landing intended and applied to such purposes, for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted, which may obstruct free access to and from the vessels.

The complaint does not aver sufficient facts to show plaintiff's right to deposit his timber at the landing, nor the duty of defendant to allow it to be stored.

Affirmed.

WHARF—RIGHT TO ERECT.—The right to erect a wharf is founded either upon the ownership of the soil or the right of eminent domain: *Jeffersonville v. Louisville etc. Co.*, 27 Ind. 100; 89 Am. Dec. 495. The riparian owner of land adjacent to water may erect a wharf out to the navigable waters, if the water is navigable in fact, and if not so navigable, he may construct anything he pleases to the thread of the stream. And his right cannot be taken away, or its value lessened, even for public use, without compensation, or without due process of law, and it cannot be taken at all for private use: *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123, and note; *Union Depot etc. Tr. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789.

PRIVATE WHARF DISTINGUISHED FROM PUBLIC WHARF.—A wharf is private when built by individuals; when built by the city authorities under the provisions of the general law, it is a public wharf: *Jeffersonville v. Louisville etc. Co.*, 27 Ind. 100; 89 Am. Dec. 495.

NAVIGABLE RIVER, RIGHT OF PURCHASER THEREON TO ERECT WHARVES: See note to *Sherlock v. Bainbridge*, 13 Am. Rep. 313.

WHARF.—As to the right to moor against a wharf in a public watercourse, see note to *Low v. Grand Trunk R'y Co.*, 39 Am. Rep. 337. As to the right of a navigator to land or deposit goods on private property adjoining the watercourse, see note to *Davis v. Winslow*, 81 Am. Dec. 587, 588.

NEW DECATUR v. BERRY.

[90 ALABAMA, 432.]

MUNICIPAL CORPORATION'S POWER TO ENACT QUARANTINE ORDINANCES.—

A municipal corporation has no power to establish and enforce quarantine regulations, when such power is not expressly nor impliedly granted, nor incident to any power granted in its charter, or essential to the declared objects and purposes of the corporation. Hence it is not liable for compensation to an officer employed by it to enforce such regulations.

C. A. Castle, and Wert and Speaks, for the appellant.

J. M. Buford, for the appellee.

McCLELLAN, J. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation, — not simply convenient, but indispensable": 1 Dillon on Municipal Corporations, sec. 89; *Smith v. Newbern*, 70 N. C. 14; 16 Am. Rep. 766; *Cook County v. McCrea*, 93 Ill. 236; *Mayor etc. v. Wetumpka Wharf Co.*, 63 Ala. 611; *Eufaula v. McNab*, 67 Ala. 590; 42 Am. Rep. 118.

Applying this statement of the powers of municipal corporations — which is said by high authority to be "the best summary of all the decisions upon that point to be found in all the books" — to the charter of the town of New Decatur as it was organized and existed in 1888, the conclusion must be against the power then exercised by that municipality to declare, establish, and enforce quarantine against the town of Decatur. New Decatur was organized under chapter 1, title 14, of the code, secs. 1486–1516, and its power to the end in question must be referable to that statute, if it exists at all. Confessedly, no such power is conferred by express words; confessedly, also, no such power is essential — not simply convenient, but indispensable — to the declared objects and purposes of the corporation. And certainly, though not confessedly in this case, the power to establish quarantine, and prohibit persons and property from coming or being removed into the town from Decatur, cannot be said to be necessarily or fairly implied in or incident to the express grants of power, which are: To pass by-laws to enforce the powers granted; to prevent and remove nuisances; license, etc., shows, amusements, and retailers; to restrain and prohibit gaming, houses of ill-fame, disorderly conduct, etc.; to establish watches, and appoint captains thereof; to establish and regulate markets and town prisons, sink and repair public wells, etc., and keep in repair streets, alleys, and drains; to license and regulate vehicles carrying for hire; to appoint a marshal, clerk, treasurer, and other necessary officers, and provide their compensation; to impose fines and provide for their collection; to supply vacancies in corporate offices; to purchase and hold property, and dispose of the same; to exercise such other powers as are conferred by law; and to levy and collect annual taxes on property. How the granting of either of

these several powers could be made the basis for a necessary or fair implication that the legislature intended also to confer the power to establish quarantine is not conceivable. How the power to prohibit persons from coming into the town, under any circumstances, can in any just sense be said to be incident to any of the powers enumerated, we are unable to see. Every power conferred may be fully exercised and effectuated without the exercise of the power here claimed. No power conferred would, in the slightest degree, be aided by the exercise of the power claimed here. The power claimed is not expressly granted; it is not implied in or incident to any power granted; it is not essential to the declared objects and purposes of the corporation; it does not exist.

The employment of the appellee by the corporate authorities as "chief of the quarantine guard" cannot find justification or authorization under the power "to establish night and day watches and patrols, and to appoint captains thereof." The watches and patrols thus provided for are for the ordinary police of the town, charged with the conservatism of peace and good order, and the enforcement of authorized ordinances of the municipal government. None of these duties were to be performed by the alleged quarantine guard, or the appellee as chief of that guard. He was employed, if at all, solely for the purpose of discharging functions with which the municipality had no power to clothe him, and rendering services which were not in furtherance of any municipal object or purpose. The corporate authorities having no power to establish quarantine regulations, they of course were without authority to execute and enforce them, and without authority to bind the town to payment for services rendered in the execution and enforcement of the *ultra vires* ordinance or resolution. And the attempt to ratify the action of the intendant, in employing appellee and assuring him that his services would be remunerated, was equally abortive as fixing any liability on the town: 1 Dillon on Municipal Corporations, secs. 463-465.

The judgment of the city court is reversed, and judgment will be here rendered for the appellant, defendant below.

MUNICIPAL CORPORATIONS — QUARANTINE ORDINANCES. — As to the power of municipalities and other public bodies, in case of contagion, to establish pest-houses and enforce quarantine regulations, and to compel those sick with contagious diseases to remove to the pest-houses, or to isolate themselves, see extended note to *Markham v. Brown*, 92 Am. Dec. 76-80; *Train v. Boston*

etc. Co., 144 Mass. 523; 59 Am. Rep. 113, and note 116-118; *Greensboro v. Ehrenreich*, 80 Ala. 579; 60 Am. Rep. 130; *Kosciusko v. Slomberg*, 68 Minn. 469, *ante*, p. 381.

MUNICIPAL CORPORATION — LIABILITY FOR SERVICES OF A PHYSICIAN. — A city, unless prohibited by its charter, is liable for the services of a physician employed by a committee assuming to act for it, when such services have been rendered, in attending persons diseased with small-pox, within its limits, with knowledge of its officers, and without notice that the contract of employment is not recognized as valid and binding, although the corporation has not formally conferred authority on the committee to make such a contract: *Ward v. Forest Grove*, 20 Or. 355.

THOMAS v. GLAZENER.

[90 ALABAMA, 537.]

EXECUTION SALE AS SATISFACTION OF JUDGMENT. — When property is sold by direction of the plaintiff in execution, with notice of a defect in the title, and he bids it off for a price sufficient to pay the judgment, the latter is thereby satisfied; and in the absence of fraud, imposition, or mistake, he cannot repudiate the purchase nor resist the effect of his bid on the mere ground that defendant in execution had no title to nor interest in the property.

Oecil Browne, for the appellants.

B. F. Wilson and W. B. Castleberry, for the appellee.

CLOPTON, J. This proceeding is a motion made by appellants to entire satisfaction of a judgment obtained by appellee against them, in the circuit court of Talladega County. The motion is based on the following admitted facts: An execution issued on the judgment, March 18, 1889, was levied by the sheriff on certain land as the property of D. B. Riser, one of the defendants in execution. The land was sold under the execution on the first Monday of July, 1889, and purchased by appellant at a price sufficient to pay the entire judgment, principal, interest, and cost. At the sale notice was given that the land did not belong to Riser. Appellee having ascertained, after the sale, that he had no title to the land nor interest therein, refused to pay the amount of the costs, and to credit the judgment with the amount of his bid in excess to the costs, and accept a deed from the sheriff. The validity of the judgment and the regularity of the execution and sale are not controverted, neither is there any pretense of fraud, imposition, or surprise. The land was levied upon and sold at the instance of the appellee, who purchased with notice of the defect of title.

However irreconcilable may be the judicial decisions as to whether a purchaser at a sheriff's sale under execution, where there is neither fraud, imposition, or surprise, will be relieved from the effect of his bid, on the mere ground that the defendant in execution had no title or interest whatever in the property, this is not an open question in this state. By our decisions, the doctrine of *caveat emptor* has been uniformly applied to sales made by the sheriff under execution; the purchaser buys at his own risk, and renders himself liable for the amount of his bid, notwithstanding the defendant in execution has no title to the property. If the plaintiff in execution purchases, his purchase operates an irrevocable satisfaction of the judgment, from which a court of equity will not relieve him, especially when he buys with notice of the defect of title: *McCartney v. King*, 25 Ala. 681; *Goodbar v. Daniel*, 88 Ala. 583; 16 Am. St. Rep. 76. Had a stranger purchased, and the sheriff received the money, the result would have been satisfaction of the execution *pro tanto*; and when property is levied on and sold by direction of the plaintiff in execution, and he bids it off, at a price sufficient to pay the entire judgment, the law appropriates the bid to the discharge of the execution and satisfaction of the judgment, notwithstanding he may refuse to accept the property: *Halcombe v. Loudermilk*, 8 Jones, 491.

We decide nothing as to effect of the statute of frauds; this question was not raised in the circuit court, and cannot be raised the first time in this court. All we decide is, that on the agreed state of facts, if there be nothing else, the motion to enter satisfaction should have been granted.

Reversed and remanded.

EXECUTION SALE AS SATISFACTION OF JUDGMENT. — A purchaser at an execution sale will not be relieved from the effect of his bid because the execution defendant had no title to the property sold. His bid is an irrevocable satisfaction of the judgment to the extent of the sum bid: *Goodbar Co. v. Daniel*, 88 Ala. 583; 16 Am. St. Rep. 76, and note. No defect or want of title can relieve a purchaser at an execution sale after confirmation: *Preston v. Breckinridge*, 86 Ky. 619; *Humphrey v. Wade*, 84 Ky. 391. Where a judgment creditor purchases at an execution sale, it will be presumed that payment was made and the judgment satisfied: *Blum v. Rogers*, 71 Tex. 668. The rule of the principal case, while in harmony with the decisions and practice in some of the states, is not in harmony with the weight of authority. Generally, where no benefit to the plaintiff has accrued through an execution sale, either because the proceedings at or anterior to it were void, or because the defendant had no interest in the property sold, the plaintiff is entitled to have the apparent satisfaction resulting from the sale set aside, and there-

upon his right to execution upon his judgment is revived: *Freeman on Judgments*, secs. 478, 478 a; *Hughes v. Streeter*, 24 Ill. 647; 76 Am. Dec. 777; *Townsend v. Smith*, 20 Tex. 465; 70 Am. Dec. 400; *Maguire v. Marks*, 28 Mo. 193; 75 Am. Dec. 121; *Cowles v. Bacon*, 21 Conn. 451; 56 Am. Dec. 571; *Cross v. Jones*, 47 Cal. 602.

MONTGOMERY v. CROSSTHWAIT.

[90 ALABAMA, 552.]

NEGOTIABLE INSTRUMENTS — CONTINGENCY NOT DESTROYING NEGOTIABILITY. — A stipulation in a promissory note to pay costs of collecting, if not paid at maturity, does not destroy its negotiability.

NEGOTIABLE INSTRUMENTS — ALTERATION. — The material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration, whether it is to the benefit or detriment of the parties objecting.

NEGOTIABLE INSTRUMENTS — ALTERATION — ADDITION OF "& Co." — The addition of "& Co." to his signature, by the maker of a promissory note, without the knowledge or consent of the indorser, will discharge him, although such addition was made without authority from the partnership.

NEGOTIABLE INSTRUMENTS — ALTERATION — WAIVER OF DISCHARGE. — Where the indorser, with full knowledge of the alteration of the note, indorses and signs a waiver of protest and notice thereof on the note, and promises to pay the same, he thereby waives the discharge otherwise resulting from the alteration, and ratifies it, although the waiver is made without any new consideration.

NEGOTIABLE INSTRUMENTS — ALTERATION — BURDEN OF PROOF. — When the instrument sued on does not bear on its face any evidence of alteration, the burden of proving that it has been altered, after indorsement, is upon the indorser or party relying on that fact to defeat a recovery.

NEGOTIABLE INSTRUMENTS — ALTERATION — ESTOPPEL AGAINST INDORSER. — Where a payee indorses a note before it is signed, and delivers it to the maker to sign, so as to enable him to obtain money for their joint benefit, he is estopped from denying the authority of the maker to sign it in the name of a partnership of which he is a member.

NEGOTIABLE INSTRUMENTS — STIPULATION IN NOTE FOR COSTS INCLUDES ATTORNEY'S FEE. — A stipulation in a note to pay all costs of collecting, not less than ten per cent, will include a reasonable attorney's fee as well as court costs.

NEGOTIABLE INSTRUMENTS — WAIVER OF PROTEST BY INDORSER — ESTOPPEL. — Where an indorser indorses a waiver of protest and notice thereof on the note, and promises to pay, he is charged with knowledge of all the paper contained at that time; and this is such a recognition of the binding force of the contract that he is thereafter precluded from making any defense based on matters then apparent on the face of the instrument.

NEGOTIABLE INSTRUMENTS — EVIDENCE. — In an action against the indorser of a note, the maker testifying that he was not indebted to the indorser at the time of indorsement, but admitting that he had received a loan of stock from him on which to raise money, may state that the loan of the stock was not considered a debt between them.

NEGOTIABLE INSTRUMENTS — EVIDENCE. — In an action against the indorser of a note, who alleges a material alteration in the maker's signature, made after indorsement, evidence by the holder that on presenting the note to the indorser on or about maturity, the latter examined it thoroughly before indorsing on it a waiver of protest and notice thereof, is admissible.

EVIDENCE — PROOF OF CHARACTER. — A witness testifying to the character of a party must, on his direct examination, confine his statement to what that character is, as upon his own knowledge, and he is not allowed to substitute for his knowledge the means or sources of it, although, on cross-examination, he may be asked what he has heard in the community touching the character of the party inquired about.

ACTION on a promissory note. This action was brought by J. D. Crosthwait against J. A. Montgomery, as the indorser of a note signed by Percy R. Smith & Co. as makers. The note named the said Montgomery as payee, and showed the following indorsement: "Pay to the order of J. D. Crosthwait, 10-12, '87," with a waiver of protest and notice. The note also contained a stipulation that "the undersigned shall pay costs for collecting above, not less than ten per cent, on failure to pay at maturity." The indorser alleged in defense a material alteration in the note after indorsement, by changing the signature of the maker from "Percy R. Smith" to "Percy R. Smith & Co.," made without his knowledge or consent. Judgment for plaintiff, and defendant appeals. Other facts are stated in the opinion.

Hewitt, Walker, and Porter, for the appellants.

Taliaferro and Smithson, and James A. Mitchell, for the appellee.

McCLELLAN, J. One of the prominent questions presented by this record is, whether the stipulation in a promissory note to pay all costs of collecting, if not paid at maturity, destroys its negotiability. Upon no other question in the law, perhaps, are the authorities so irreconcilably and at the same time so equally divided, both in respect to the number of adjudged cases and the respectability of the courts upon either hand. The following cases maintain the commercial character of notes which embody the stipulation referred to: *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Pate v. First Nat. Bank*, 63 Ind. 264; *Maxwell v. Morehart*, 66 Ind. 301; *Proctor v. Baldwin*, 82 Ind. 370; *Hubbard v. Harrison*, 38 Ind. 327; *Heard v. Dubuque Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Sperry v. Horr*, 32 Iowa, 184; *Nickerson v. Sheldon*, 33 Ill. 373; 85

Am. Dec. 280; *Dietrich v. Bayhi*, 23 La. Ann. 767; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; 21 Am. Rep. 209; *Wilson Sewing-machine Co. v. Moreno*, 7 Fed. Rep. 806; *Seaton v. Scovill*, 18 Kan. 435; 26 Am. Rep. 779; *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 671; *Trader v. Chidester*, 41 Ark. 242; 48 Am. Rep. 38; *Farmers' Nat. Bank v. Rasmussen*, 1 Dak. 60; *Schlesinger v. Arline*, 31 Fed. Rep. 648; *Howenstein v. Barnes*, 5 Dill. 482; *Adams v. Addington*, 16 Fed. Rep. 89. And the following sustain the doctrine that the stipulation involves such contingency and uncertainty as to the sum payable as to destroy negotiability: *First Nat. Bank v. Bynum*, 84 N. C. 24; 37 Am. Rep. 604; *First Nat. Bank v. Gay*, 63 Mo. 83; 21 Am. Rep. 430; *Goodloe v. Taylor*, 3 Hawks, 458; *First Nat. Bank v. Marlow*, 71 Mo. 618; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank v. Jacobs*, 73 Mo. 35; *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675; *First Nat. Bank v. Larsen*, 60 Wis. 206; 50 Am. Rep. 365; *Maryland etc. Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 750; *Mahoney v. Fitzpatrick*, 133 Mass. 151; 43 Am. Rep. 502; *Jones v. Radatz*, 27 Minn. 240; *Cayuga Co. Nat. Bank v. Purdy*, 56 Mich. 6; *Altman v. Rittenshofer*, 86 Mich. 287; 13 Am. St. Rep. 341; *South Bend Iron Works v. Paddock*, 87 Kan. 510; *Farquhar v. Fidelity Co.*, 13 Phila. 473.

The question has never been determined in this state. It was mooted somewhat in the case of *Hanover National Bank v. Johnson*, 90 Ala. 549, and dismissed with an indication on the part of the present writer unfavorable to the negotiability of such instruments. Such was the inclination of my mind at that time. A more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts are made to rest, have produced the contrary conviction, and lead me to adopt the view first advanced by the Indiana and Kentucky courts, and which has since received the sanction of all recognized texts which discuss the point: *Tiedeman on Commercial Paper*, sec. 28 b; 1 *Randolph on Commercial Paper*, secs. 205, 206; 1 *Daniel on Negotiable Instruments*, secs. 62, 62 a; *Parsons on Bills and Notes*, 146, 147; 2 *Am. & Eng. Ency. of Law*, 324.

The cardinal principle that the sum to be paid must be certain in amount, and not dependent upon contingencies, is fully recognized and accommodated in this doctrine. It is

true, the stipulation involves a contingency, in that there may or may not be any costs of collection to be paid, depending primarily upon failure to pay the note at maturity, and secondarily, upon whether the note should be paid, even after dishonor, without resort to attorneys or legal proceedings. It is true, also, that the amount of such costs, if any, is uncertain. But it is fully assured that no costs will be incurred before maturity; and no costs will have to be paid at all, unless there is default in the payment of the sum promised at maturity; and the paper ceases by reason of that fact alone to be a circulating medium, performing in a sense the functions of money. So that as long as the paper, considered apart from the stipulation, would be negotiable, it will have that character, notwithstanding the stipulation. Looked at in this way, stipulated attorney's fees and costs of collection after maturity stand upon the same footing as to contingency of liability therefor, and uncertainty as to the amount thereof, as do protest fees, attorney's tax fees, court costs, and statutory damages, in the event a resort is had to legal remedies to enforce payment; and it is not conceivable why the former class of charges should destroy negotiability, while the latter confessedly do not: *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Gaar v. Louisville Banking Co.*, 11 Bush, 180; 21 Am. Rep. 209. The Pennsylvania court has said that a "promissory note is a courier without luggage, traveling on the wings of the wind, and should not be lumbered up" with provisions of the class under consideration. Another high authority has declared that a stipulation for attorney's fees is "not luggage, but ballast," and does not clog the circulation of the paper, but facilitates its progress. To further pursue the metaphor, it were, we think, more apt to say that the stipulation is neither luggage or ballast, and neither impedes or facilitates the flight of the paper through the transactions of commerce, since all persons are presumed to deal with it upon the assumption that it will be paid at maturity; but is for the well-being of the "courier," when its monetary functions have been fully discharged, and its journey as a circulating medium has been brought to an end by default in payment at maturity.

Our conclusion is, therefore, that the note sued on here was for a sum certain, the payment of which depended upon no contingency; and being payable at a bank, it is commercial paper within sections 2094, 2112, and 2113 of the code of

1876, and sections 1756 and 1778 of the code of 1886. The demurrer to the complaint, which proceeded on the contrary assumption, was properly overruled.

We understand the law to be well settled that a material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration; and this without regard to whether the alteration is apparently or presumably to the benefit or detriment of the parties objecting. Courts cannot undertake to say that a party would have made the contract as altered, and thus make it for him, merely because its terms are more favorable to him than those embodied in the original instrument, any more than a like conclusion could be justified where the alteration imports additional liability. In the one case, no less than in the other, the altered paper is not the contract which the party has made; and in neither case can the courts declare it to be his contract, or enforce it as such. The law proceeds on the idea that the identity of the contract has been destroyed; that the contract made is not the contract before the court; that the party did not make the contract which is before the court; and so adjudging, it cannot go further, and hold him bound by it on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him. There are some expressions in the books to the contrary. They will, for the most part, and certainly so far as the adjudications of this court are concerned, be found in cases where the change was prejudicial to the party complaining; and this fact is made one of the reasons for the decision against liability, though it might as well have been rested entirely on the abstract fact of alteration. Thus in the case of *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 720, reference is made to the prejudicial character of the alteration; but the conclusion there reached might better have been based solely on the change in the legal identity of the contract, — a doctrine there fully recognized *arguendo*, — entirely regardless of the effect upon the promisor. It was not decided in that case that an alteration favorable to the party seeking to avoid the instrument would not release him. The sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46, and there applied to a surety: that any

material alteration by one not a stranger to the paper, whether injurious or not, avoids the contract as to all parties not consenting. It is enough that if the instrument were genuine it would operate differently from the original; or, as otherwise expressed, avoidance will result "if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke": *Mahaiwe Bank v. Douglass*, 31 Conn. 170, 181; *Gardner v. Walsh*, 5 El. & B. 82; *Morrill v. Otis*, 12 N. H. 466; *Reeves v. Pierson*, 23 Hun, 185; *Humphreys v. Guilloe*, 13 N. H. 387; 38 Am. Dec. 499; *Dickerman v. Miner*, 43 Iowa, 508; *Lunt v. Silver*, 5 Mo. App. 186; 2 Parsons on Bills and Notes, 551-564; Tiedeman on Commercial Paper, sec. 394; 3 Randolph on Commercial Paper, sec. 1743; and many other authorities.

Even were the rules of law otherwise, we are unable to see how appellee could be benefited by it. The appellant might, for very good reasons, have preferred to indorse for Percy R. Smith, in preference to Percy R. Smith & Co., for aught this or the trial court could know. It may be, for instance, that Smith had abundant property to pay his individual debts, while the firm of Smith & Co. may be wholly insolvent, so that the indorser for Smith individually would be saved harmless on a marshaling of assets, while the indorser for Smith & Co., forced to look to firm assets, with only the excess of individual assets after paying individual liabilities, would lose his claim in whole or in part. So that it could not be safely assumed that the change from "Percy R. Smith" to "Percy R. Smith & Co." was beneficial to the indorser.

That the alteration was a material one we have no doubt. The considerations just adverted to demonstrate that it was; and the authorities are full to the point that the addition of other names as makers discharges parties already bound by the paper: *Cases supra*; and *Wallace v. Jewell*, 21 Ohio St. 170; 8 Am. Rep. 48; *Davis v. Coleman*, 7 Ired. 424; *Hall v. McHenry*, 19 Iowa, 521; 87 Am. Dec. 451; *Henry v. Coats*, 17 Ind. 161; *Broughton v. Fuller*, 9 Vt. 373; *Anderson v. Bellen-ger*, 87 Ala. 334; 13 Am. St. Rep. 46. The effect of adding "& Co." was to make that partnership and the members of it, on the face of the paper, parties to it, whereas only one member of that firm, and he in his individual capacity alone, was a party to the original contract. The precise alteration here involved was adjudged to be a material one in the case of *Haskell v. Champion*, 30 Mo. 136.

Nor is it of moment, in this connection, that in point of extraneous fact the firm of Smith & Co. was not bound by the signature, because of a want of authority in Smith to sign the firm name to the paper. The court is to determine the materiality of the alteration by an inspection of the instrument. Evidence *aliunde* will be received to show the fact of alteration, and, in a proper case, also that the alteration was in accordance with the intention of the parties; but with these exceptions the court cannot, on the question of materiality, look beyond the paper. Considering the original by comparison with the altered paper, it is to determine whether the latter, assuming its genuineness, evidences a contract materially variant from the former. It can make no difference that the parties the addition of whose names constitutes the alteration are not in fact bound by the instrument. On the face of it they are bound. On its face, therefore, the contract is not identical with the original. The legal identity of the first is destroyed, and parties not consenting thereto are discharged. Thus in *Haskell v. Champion*, 80 Mo. 186, it was ruled that the addition of "& Co." to the maker's name discharged the indorser, although there was no such firm, but the maker was a member of another firm. Here the firm clearly was not bound; nobody was in fact bound but the original maker; but on the face of the paper not only he, but a firm of which he was a member, was liable. The question of materiality was determined, not by the outside fact, but by the paper, and other parties were held to be discharged.

To the pleas which set up the alteration we have been discussing it was replied that the defendant indorser, with full knowledge of the alteration, indorsed and signed a waiver of protest and notice of protest on the note, "and at divers times, both before and since the maturity of said instrument, ratified the signature signed thereto, and the supposed alteration of said instrument by said Smith, and promised to pay it"; and also, generally, that the defendant had waived the right, and is now estopped to plead said alteration. Eliminating the legal conclusions alleged in these replications, there yet remain two averments of fact: that with full knowledge of the alteration the defendant waived protest and notice by indorsement of the note over his own signature, and promised to pay the same. This, in our opinion, was a good replication to the matter pleaded, and the several demurrers to it were properly overruled. These facts, standing alone,

constitute a waiver of the discharge otherwise operated by the alteration, or the adoption of the act of Smith in making the alteration. The authorities are uniform to the point that such an alteration may be made by the consent of the parties: *Ravies v. Alton*, 5 Ala. 297; *Hill v. Nelms*, 86 Ala. 442; Tiedeman on Commercial Paper, sec. 896; 3 Randolph on Commercial Paper, sec. 1766; 2 Daniel on Negotiable Instruments, sec. 412; 2 Parsons on Bills and Notes, 565. And it is a very general proposition, that an act which may be authorized or consented to *in limine* may be effectually ratified after it has been performed, and *e converso*: *Knox v. Armistead*, 87 Ala. 510; 13 Am. St. Rep. 65; *First Nat. Bank v. Gay*, 63 Mo. 88, 39; 21 Am. Rep. 430; *Commercial Bank v. Warren*, 15 N. Y. 577. At least, it is certain that an alteration such as is shown here may be ratified by the innocent party affected by it, so as to bind him to all intents and purposes, as if he had fully authorized it in the first instance: *Bank v. Rising*, 4 Hun, 793; *Huntington v. Ballou*, 2 Lans. 120; *Kershaw v. Cox*, 3 Esp. 246; *Hazard v. Spears*, 2 Abb. App. 853; *Kilkelly v. Martin*, 84 Wis. 525; *Stewart v. First Nat. Bank*, 40 Mich. 848; *Goodspeed v. Cutler*, 75 Ill. 534. And efficient ratification will be implied from facts such are set forth in these replications: *Evans v. Foreman*, 60 Mo. 449; *Bell v. Mabin*, 69 Iowa, 401; *Stewart v. First Nat. Bank*, 40 Mich. 848; *Grimstead v. Briggs*, 4 Iowa, 559; *Union Bank v. Middlebrook*, 33 Conn. 95; *Coriss v. Tattersal*, 2 Man. & G. 590; *Weed v. Carpenter*, 10 Wend. 403; *Bowers v. Jewell*, 2 N. H. 543.

Whether a new consideration is essential to support the contract thus made by ratification, there is some conflict of authority. The courts of Kentucky and Minnesota hold that a new consideration is necessary: *Wilson v. Hayes*, 40 Minn. 531; 12 Am. St. Rep. 754; *Warren v. Fant*, 79 Ky. 1. But a great majority of courts of last resort, if indeed not all of them, except in the states named, sustain the contrary doctrine: *Commercial Bank v. Warren*, 15 N. Y. 577; *Pelton v. Prescott*, 13 Iowa, 567; *King v. Hunt*, 13 Mo. 97; *Prouty v. Wilson*, 123 Mass. 297; *Goodspeed v. Cutler*, 75 Ill. 534; *Stewart v. First Nat. Bank*, 40 Mich. 848. With respect to this question we adopt the language and conclusion of the Missouri court in a strictly analogous case. "There have been many refinements adopted about this doctrine of ratification, — refinements which savor more of subtlety than of sound judgment. With some exceptions, not necessary to be adverted to

here, the general proposition is, however, undoubtedly correct, that he who may authorize in the beginning may ratify in the end. . . . And there is therefore no force in the point urged on our attention, that there would have to be a new consideration, in order to attach validity to a confirmatory act. No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why anything more should be required on subsequent sanction than on original assent": *First Nat. Bank v. Gay*, 63 Mo. 39; 21 Am. Rep. 430. Coming now to the bill of exceptions, it is first to be noted that what we have said in relation to ratification of the alleged alteration, and to the effect that ratification may be inferred or implied from circumstances, and need not be supported by a new or distinct consideration, when applied to charges 4, 7, 8, 12, 15, and 19, given at the request of the plaintiff, and charges 8, 16, and 19, asked by the defendant and refused, serves to determine the exceptions reserved to the action of the court in respect thereto against the appellant.

The instrument sued on did not bear on its face any evidence of having been altered at any time. The burden of proving that it had been altered after indorsement was therefore upon the party who relied on that fact to defeat recovery against him. It follows that appellant's exceptions to charges 1, 2, and 5, given at the instance of plaintiff, and to the refusal of the court to give charges 1, 2, 3, 4, 9, and 18, as requested by defendant, which proceed on the theory that it was upon the plaintiff to disprove the alleged alteration, are untenable: 2 Daniel on Negotiable Instruments, sec. 1421; 3 Randolph on Commercial Paper, sec. 1785; Tiedeman on Commercial Paper, sec. 393; *Barelift v. Treese*, 77 Ala. 528.

Charge numbered 5, given for plaintiff, is faulty in one of its clauses, when considered alone, in that it might be construed to authorize the jury to find according to the preponderance of evidence, regardless of whether such preponderance was sufficiently great to reasonably satisfy their minds. This fault is obviated in other portions of the instruction, where it is said the defendant must satisfy the jury by a preponderance of the evidence that the fact in issue is as he alleges it to be; and even were this otherwise, the appellant could not complain, for the error, if any, in the charge is favorable to him: *Mays v. Williams*, 27 Ala. 287; *Jarrell v. Lillie*, 40 Ala. 271; *Vandeventer v. Ford*, 60 Ala. 610.

There was evidence which tended to show that the note was indorsed by the defendant before it was signed, and was delivered to Smith to be signed in such a way as would enable him to get the money on it for himself and Montgomery. We hold that this agreement, if it existed, authorized Smith, so far as Montgomery was concerned, to sign the firm name of Percy R. Smith & Co. to the paper, since, without any agreement, Smith had the right to fill up the blank by inserting his own name as maker; and to accord any operation to the agreement, it must be construed into a consent by the defendant to subscribing of the name of Smith's firm. Whether Smith had as between himself and his copartner the right to so sign is immaterial. Montgomery's consent to the thing that was done estops him now to object to its having been done, whether Smith, in point of legal fact, had the power to do it or not. Charges 3 and 18, given for the plaintiff, find justification in these considerations.

We construe plaintiff's charge numbered 6 to assert that if the note was made on the joint account of Smith and Montgomery, and was indorsed by the latter before it had been signed, but afterwards, in pursuance of their agreement, executed by attaching thereto the name of Percy R. Smith & Co., Montgomery, having received his share of the proceeds, is bound by his indorsement. So construed, if this instruction has an infirmity, it lies in its being too favorable to the defendant. The fact postulated, that the signature of Smith & Co. was attached in consonance with the previous understanding between Smith and Montgomery, would, of itself, and wholly irrespective of Montgomery's interest in the money borrowed, be quite sufficient to bind him. The appellant can take nothing on his assignment of error directed against this charge.

Charges 9, 10, 11, 13, and 16, for plaintiff, as modified by the explanatory charge given in connection therewith, are correct expositions of the familiar rule of law applicable to the filling of blanks left in promissory notes at the time of indorsement.

The stipulation to "pay all costs of collecting, not less than ten per cent," must be construed to refer to other than court costs, since the parties bound on the paper are liable for those without any agreement to pay them. Other costs of collection ordinarily consist of attorney's fees; and the stipulation may be interpreted as if it provided for the payment of

ten per cent attorney's fees, or a greater amount than that, if expended reasonably and properly in realizing on the note. Stipulations to pay a given per cent for the services of attorneys are held to import liability for reasonable compensation for legal services rendered in that behalf, not in excess of the amount limited. We do not think the stipulation here is for more than this, and hence that it can be enforced to this extent in the present action. Charge 5, asked by defendant, was well refused.

It would unduly extend this opinion, and serve no good purpose, to discuss the remaining charges requested by the appellant in detail. Enough has already been said, we think, to show that they severally are either affirmatively bad, as stating propositions which are unsound, or are abstract, or misleading, or invasive of the province of the jury. Not a few of them, for instance, are addressed to the question of defendant's estoppel to rely upon the alleged alteration, and set forth that this, that, and the other fact does not estop him to avail himself of it. This matter of estoppel was not nearly so prominent in the case as the question of ratification and promise to pay after knowledge of the alteration; and the tendency of all these charges was to mislead the jury into discharging the defendant, because he was not technically estopped to set up this defense, although they may have been fully satisfied that the defendant, being let in to make this defense, had utterly failed to sustain it with evidence.

Moreover, we are by no means prepared to say that the proposition of these charges is absolutely correct. On the contrary, we apprehend that the indorsement of a waiver of protest and notice of protest on a paper, as shown here, implies knowledge of all the paper contained at that time, and was such a recognition of its binding force as a contract as precludes the party from making any defense based on matters then apparent upon the face of the instrument; and certainly such would be the effect when the indorsement of the waiver is accompanied by a promise to pay the note.

We have examined the trial court's rulings on evidence to which exceptions were reserved, and find no error in them.

The statement of the witness Smith, that the loan of stock by Montgomery to him, to enable him to borrow money upon its security, "was not considered a debt between us," considered with the context of his answer to the interrogatory, was no more or less than to say that there was no agreement that

he should pay Montgomery for the stock; the clear implication being, that when it had performed the purpose of the loan,—that is, had been used as collateral by Smith,—it should be returned *in specie* to Montgomery.

The statement of plaintiff, made as a witness, that the defendant, at a certain time, “examined the note thoroughly,” the issue being whether he knew that it was signed as by Percy R. Smith & Co., was but a “short-hand” rendering of the facts involved in reading the paper, and ascertaining all of its contents. It was properly admitted: *Woodstock Iron Co. v. Roberts*, 87 Ala. 436; *Perry v. State*, 87 Ala. 30.

It has become to be a familiar rule of law in this state that a witness as to character may, on cross-examination, be interrogated as to what he has heard in the community touching the character of the party inquired about. This is to afford a test of the value of his evidence in chief, to show that his conclusion as to the reputation in issue, and which rests upon the estimation of the community, is not supported by the expressions of that estimation, and thus to weaken its force. Such expressions cannot be given in evidence by the party whose witness is being examined, and who testifies that he knows the character under inquiry. He must state what that character is, as upon his own knowledge, and is not allowed to substitute for his knowledge the means or sources of it. On these principles, the action of the city court in refusing to allow the witness Mudd to testify to the character of the adverse criticism he had testified on cross-examination to having heard on the character of Smith, and in excluding the evidence of Read, given in chief, that “he had heard a good many people say they would not believe Smith on oath,” was unobjectionable. The ruling as to Mudd’s testimony, moreover, may be sustained on the further ground that it involved no injury to appellant, in that he had already deposed to the character of the criticism which he had heard with respect to Smith’s character, to the effect that they were “severe” expressions condemnatory of Smith.

We find no error in this record, and the judgment of the city court is affirmed.

PROMISSORY NOTES — NEGOTIABILITY. — A written promise to pay a certain sum on a certain day, and costs of collection, including attorney’s fees, is not a negotiable instrument: *Altman v. Rittershofer*, 68 Mich. 287; 13 Am. St. Rep. 341; note to *Iron City Nat. Bank v. McCord*, 23 Am. St. Rep. 169; *Second Nat. Bank v. Wheeler*, 75 Mich. 546; note to *Bowls v. Hall*, 9 Am. St. Rep. 436.

PROMISSORY NOTES — ALTERATIONS. — A material alteration of a promissory note by one of the parties discharges all the other parties not authorizing or consenting to such alteration: *Burrows v. Klink*, 70 Md. 451; 14 Am. St. Rep. 371, and note; *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and note 25, 26. And this rule applies to accommodation notes: *Trigg v. Taylor*, 27 Mo. 245; 72 Am. Dec. 263.

PROMISSORY NOTES — ALTERATION. — The addition of the words "Presdt. O. F. B. Assn.," by one of the makers of a promissory note to his signature, is a material alteration, invalidating the note as against the other makers: *First Nat. Bank v. Fricke*, 75 Mo. 178; 42 Am. Rep. 397.

PROMISSORY NOTES — ALTERATION OF — BURDEN OF PROOF. — No evidence of alteration appearing upon the face of a note, the burden of proving an alteration is upon him who alleges it: *Note to Nagle's Estate*, 19 Am. St. Rep. 673, 674.

BILLS AND NOTES — COSTS — ATTORNEY'S FEES. — The term "costs" includes, in its legal sense, not only the expenses incurred by reason of being a party to legal proceedings, but also such charges as an attorney would be entitled to recover from his client for professional services: *Williams v. Flowers*, 90 Ala. 136; *ante*, p. 772, and note.

WITNESS, IMPEACHMENT OF, BY PROOF OF CHARACTER: See *Birmingham etc. Ry Co. v. Hale*, 90 Ala. 8; *ante*, p. 748, and note.

MARTIN v. STATE.

[90 ALABAMA, 602.]

CRIMINAL LAW — RESPONSIBILITY OF INFANT. — Between the ages of seven and fourteen years, an infant is *prima facie* incapable of committing a crime amounting to felony; but the presumption may be rebutted by clear proof of sufficient knowledge and capacity. The presumption of incapacity decreases with the increase of years.

CRIMINAL LAW — CONFESSION OF INFANT AS EVIDENCE. — When the *corpus delicti* is otherwise shown, a conviction of felony may be had against a defendant under fourteen years of age on his confessions alone, if clearly established, and if it is fully shown that the accused is *doli capax*.

CRIMINAL LAW — OPINION AS TO AGE AS EVIDENCE. — When the issue involved is as to whether or not the accused was fourteen years of age at the time of the commission of the alleged felony, a witness who has known him for seven or eight years is incompetent to testify that, in his opinion, the accused was fifteen or sixteen years of age.

CRIMINAL LAW — PROOF OF MENTAL CAPACITY OF INFANT. — On the trial of one accused of murder, who appears to have been about fourteen years of age at the time that the homicide was committed, the testimony of witnesses acquainted with the accused, that he was or was not of bright or quick mind, is admissible.

CRIMINAL LAW — PROOF OF CHARACTER OF DECEASED. — On a trial for murder, proof that the deceased had a violent temper is not rebutted by evidence that his character was not bad. Character for violent temper and for being bad are not the same.

CRIMINAL LAW — SELF-DEFENSE — RETREAT. — One in his own domicile may defend himself without retreating therefrom; but after retreating

from it, this principle no longer applies, and he cannot then strike with a deadly weapon, unless it reasonably appears to be necessary to save himself from grievous bodily harm.

INDICTMENT for murder. The defendant was a negro about fourteen years of age. His victim was of the same race, and about seventeen years old. They were farm-laborers, and occupied the same room. They began to quarrel about ten o'clock at night, after defendant had gone to bed, and when no one was present but themselves. The deceased took defendant's knife out of his pocket, threatened to kill him, and struck at him with a piece of wood as he was in the act of running out of the room. The deceased followed defendant outside the room, threatening to kill him, whereupon defendant struck him with a rock, fracturing his skull and killing him. The defendant voluntarily confessed to this state of facts.

Brown, Holliday, and Street, for the appellant.

William L. Martin, attorney-general, for the state.

STONE, C. J. The defendant was indicted for murder, and was convicted of manslaughter in the first degree. The accused was a youth about fourteen years old, but whether he was under or over that age was a controverted question before the jury. Most of the questions reserved have some relation to that inquiry.

There is a common-law principle, venerable for its age, that in case of a minor between seven and fourteen years of age, the presumption is, that he or she had not the requisite guilty knowledge of the wrongfulness or wickedness of the act charged to authorize a conviction of felony. But the presumption is only *prima facie*, and may be rebutted by clear evidence of a mischievous discretion, or by proof of knowledge of good and evil, which knowledge must be distinctly made to appear from the evidence: 4 Am. & Eng. Ency. of Law, 684. In 1 Wharton's Criminal Law, 9th ed., sec. 68, the principle is thus stated: "Between the age of seven and fourteen, responsibility is conditioned on capacity. If it appears that a child within these limits is *capax doli*, which is to be determined by the circumstances of the case, he may be convicted and condemned. . . . As to a child between seven and fourteen, the presumption is rebuttable, the burden of overcoming it being on the prosecution, the intensity of the proof varying with age and other circumstances." And in

1 Bishop's Criminal Law, 7th ed., sec. 390, that author says: "Evidently the presumption of incapacity decreases with the increase of years. There is a vast difference between a child a day under fourteen and one a day over seven."

Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494, presented the question we are considering. Godfrey was about eleven or twelve years old when he committed the homicide for which he was tried. He was indicted and tried for murder, and found guilty as charged. The trial court, in charging the jury, among other things, said "that if they were satisfied that the defendant was the guilty agent, and that the charge was established as alleged in the indictment, they must ascertain whether the defendant was of sufficient age and intelligence to be capable of committing the offense, and to be held accountable for his acts; that no one under the age of seven years should be responsible for the commission of a felony; that from seven to fourteen years of age the presumption was that a child had not sufficient discretion or judgment to be held accountable for his acts, when charged with a felony, but that this presumption might be rebutted by evidence; that they must take into consideration his condition as a negro and a slave, with all the evidence in the case; and that unless they were satisfied from the evidence that he was fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent malice in the manner of executing the act, they should render a verdict of not guilty; but if, on the whole evidence, they were satisfied beyond a reasonable doubt that he was fully aware of the nature and consequences of the act he committed, and had plainly shown intelligent design and malice in its execution, they would be authorized to return a verdict of guilty." This court, in a very careful opinion based on many authorities, pronounced a full approval of the foregoing charge, and affirmed the judgment of conviction.

We fully approve the principles declared in Godfrey's case, and will follow them.

Another important legal inquiry is raised by the rulings of the trial court. To what extent, and under what limitations, are confessions of a person under fourteen years old to be received as criminating evidence, when such person is on trial for a felony? It has been often said that such confessions cannot be made the basis of a conviction, without proof *abundant* of the *corpus delicti*; that is, that the alleged crime has

been committed by some one. Such proof was made in this case. It was shown that the deceased came to his death by a violent blow on the head, fracturing his skull. We think we follow the weight of authority, and reason as well, when we hold that, the *corpus delicti* being otherwise shown, a conviction of felony may be had against a defendant under fourteen years of age on confessions alone, if clearly established, and if it be fully proved that the accused was *doli capax*, under the careful rule declared in Godfrey's case: 4 Am. & Eng. Ency. of Law, 685, note 6; 1 Bishop's Crim. Law, 7th ed., sec. 370, note 8; 1 Wharton's Crim. Law, sec. 74, and notes; *State v. Guild*, 9 N. J. Eq. 163; 18 Am. Dec. 404; *Rex v. Thornton*, 1 Moody, 27; *Commonwealth v. Smith*, 119 Mass. 305; 1 Bishop's Crim. Proc., 3d ed., sec. 1231.

Another question is raised as to the manner of proving the age of the accused. A witness, Gilbreath, testified, against defendant's objection, that, in his opinion or judgment, he was fifteen or sixteen years old. He stated he had known defendant about seven or eight years, and that the testimony he gave was only his opinion or judgment. The court erred in receiving this evidence, which was, at most, a mere inference or opinion of the witness. The authorities are not in harmony on this question. It is sometimes said a physician may give his opinion as an expert; but we need not decide that. What we decide is, that a non-expert cannot give his opinion on the question of age. Jurors, seeing the prisoner, may and will draw their inferences, based on his appearance; but we hold it would be too perilous to allow a non-expert witness to give his opinion in such a case as this, even if a physician should be permitted to do so: 1 Wharton's Crim. Law, sec. 73; 4 Am. & Eng. Ency. of Law, 685, note 5. *Weed v. State*, 55 Ala. 13, construed in the light of the facts, is not opposed to this principle.

Possibly witnesses could speak with some confidence of the probable age of an infant in the arms of its nurse; but development after that stage is so unequal that it would be dangerous to receive opinion evidence, at least of a non-expert, upon a question of such vital importance to the accused: *Weed v. State*, 55 Ala. 13.

The circuit court did not err in allowing witnesses acquainted with the accused to give evidence that he was or was not of bright or quick mind. It would seem difficult to prove it in any other way. Such proof was received in God-

frey's case. Nor did the court err in any other ruling on the evidence to which exception was reserved, except one. It was attempted in defense to show that deceased had a violent temper or disposition. The circumstances of this case authorized such proof, if it could be made: *King v. State*, 90 Ala. 612-617, and authorities cited. In rebuttal, the state was permitted to prove that deceased "had not the character of being a bad boy." The court erred in this. In common parlance, the two traits — character for violent temper and bad boy — are not one and the same. One may have a hasty or violent temper, and yet, in common acceptation, not be regarded as a bad boy. Amiable, peaceable, slow to anger, make up the antithesis to quick or violent temper.

All the testimony tended to show that the accused was near, if not quite, fourteen years of age when the homicide was committed. The circuit court did not err in refusing to exclude all evidence of defendant's confessions. We have seen that, in a case like this, such confessions are not, as matter of law, illegal evidence. Their sufficiency was for the jury. If they, together with the other testimony, amounted to that fuller measure of proof which is required when the defendant is ascertained to be under fourteen, then the defendant was properly convicted, whether he had attained the age of fourteen or not.

Under the foregoing rules, we hold that the circuit court did not err in refusing to give charges 1, 2, 4, 11, 15, 16. Charges 1, 4, and 11 are clearly bad, under the rules we have declared. The first is faulty, because it misplaces the burden of proof as to reasonable apprehension of an attack. The others are fatally bad. Charges 15 and 16 are argumentative, and were rightly refused on that account. An additional fault is found in the fact that they deny to the jury the privilege of considering the appearance of defendant in determining his age.

It is true that one in his own domicile may defend himself without retreating therefrom: *Roberts v. State*, 68 Ala. 156; 9 Am. & Eng. Ency. of Law, 606. If, however, he has retreated from his domicile and inclosure, and he attempts afterwards to defend himself, the principle which excuses one from retreating from his own domicile is no longer applicable: *Watkins v. State*, 89 Ala. 82. He may not then strike with a deadly weapon, unless it reasonably appears to be necessary to save himself from grievous bodily harm. The doctrine of

retreat or continued retreat would apply in the case supposed: 3 Brickell's Digest, p. 219, sec. 574. These remarks apply to charges 5 and 8, asked by defendant.

Charges 3, 6, 7, 9, 10, 12, 13, and 14 ought to have been given.

Reversed and remanded.

CRIMINAL LAW — INFANT'S CAPACITY TO COMMIT CRIME. — A child under seven years of age is conclusively presumed incapable of committing crime; but between the ages of seven and fourteen this presumption is only *prima facie*: *Heirman v. Commonwealth*, 84 Ky. 457; 4 Am. St. Rep. 207, and note; see also note to *Godfrey v. State*, 70 Am. Dec. 496-499, where this subject is discussed.

CRIMINAL LAW — EVIDENCE — CONFESSION OF INFANTS. — The confession of a boy twelve years and five months old may justify his conviction and execution for the crime of murder: *State v. Guild*, 9 N. J. Eq. 163; 18 Am. Dec. 404.

CRIMINAL LAW — PROOF OF MENTAL CAPACITY OF AN INFANT. — Evidence is admissible to show the education, habits, and that he was possessed of the ordinary intelligence of boys of his age, in proof that an infant had sufficient discretion to render him responsible for his crime: *Oarr v. State*, 24 Tex. App. 562; 5 Am. St. Rep. 905, and note. The test of accountability for crime is the ability of the accused to distinguish right from wrong: *State v. Potts*, 100 N. C. 437.

CRIMINAL LAW — EVIDENCE — CHARACTER OF DECEASED. — The character of the deceased for violence and bad temper is admissible, as bearing upon the act and motive of the prisoner: *State v. Turner*, 29 S. C. 34; 13 Am. St. Rep. 706, and note; *Hussey v. State*, 87 Ala. 122.

CRIMINAL LAW — SELF-DEFENSE. — One acts in self-defense in killing another when he believes his life is in immediate danger, or if such danger is reasonably apparent: *Stanley v. Commonwealth*, 86 Ky. 440; 9 Am. St. Rep. 305, and particularly note; *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 682, and note; *Perkins v. State*, 78 Wis. 551; *Bernards v. State*, 88 Tenn. 183; *Nalley v. State*, 28 Tex. App. 387; *Cochran v. State*, 28 Tex. App. 422. It is error to instruct the jury that self-defense "will not justify the killing, if the necessity for the killing can be avoided by retreat": *Perkins v. State*, 78 Wis. 551; *Erwin v. State*, 29 Ohio St. 186; 23 Am. Rep. 733, and note. A man's house is his castle, and he is not required to retreat from it when assailed: *State v. Patterson*, 45 Vt. 306; 12 Am. Rep. 200, and extended note; *Watkins v. State*, 89 Ala. 82.

JONES v. STATE.

[90 ALABAMA, 623.]

CRIMINAL LAW — ASSAULT WITH INTENT TO RAPE. — On a trial for an assault with intent to rape, the evidence, to be sufficient to convict, must show such acts and conduct of the accused as leave no reasonable doubt of his intention to gratify his lustful desire, against the consent of the female, notwithstanding resistance on her part. Hence evidence that the accused put his hands lightly on the woman's shoulders, following her silently about sixty feet, making no threats or effort to stop her, nor attempting any coercion, nor to put her in terror, and that he ran away without attempting to detain her when she screamed, upon his making known to her his desire to have sexual intercourse, will not justify a conviction of assault with intent to rape, although it will justify a conviction for assault and battery.

Gregory L. and H. T. Smith, for the appellant.

William L. Martin, attorney-general, for the state.

CLOPTON, J. Under the penal statutes of this state, when the female is not an imbecile, or is not rendered unconscious or bodily weak by the administration of any drug or other substance, or is not deceived by false personation of her husband, or is not under ten years of age, force is an essential element of the offense of rape: Code, secs. 3736-3740; *Dawkins v. State*, 58 Ala. 376; 29 Am. Rep. 754. And on a charge of an assault with intent to commit rape, the evidence, to be sufficient to justify the conviction, should show such acts and conduct of the accused that there is no reasonable doubt of his intention to gratify his lustful desire against the consent of the female, notwithstanding resistance on her part: *Lewis v. State*, 35 Ala. 380.

The testimony of the woman whose person the defendant is charged with intent to ravish is the only evidence showing the facts and circumstances at the time. She testified that as she was approaching a swamp through which the public road runs she passed the accused with a bucket in his hand, ostensibly engaged in picking blackberries; that after she had passed him some feet, and just as she stepped up on the south end of an elevated plank walk, which runs alongside the public road sixty or seventy feet, and when within a few feet of the edge of the swamp, she felt something like somebody putting his hands on her shoulders; that she heard no footsteps behind her, but just before she got to the north end of the walk she turned, and saw defendant following very close, and asked what he meant; to which he replied, "Stop right there"

and gratify his desire, using language unfit to be repeated; that she immediately screamed and ran north, and he immediately ran south. The defendant proved a good character.

In *Commonwealth v. Merrill*, 14 Gray, 415, 77 Am. Dec. 336, it is said: "The nature of the charge [assault with intent to commit rape] presupposes that the intent of the prisoner was not carried out. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, or equally consistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty." In *Saddler v. State*, 12 Tex. App. 194, the evidence was, that the woman was sleeping under an arbor, and sometime during the night the defendant woke her by pulling up her clothes, standing by her bed; that when she told him to leave, he stepped back a foot or two, looked at her, and said he would leave when he pleased; that she ordered him three times to leave, and he walked off, muttering something she did not understand. Wheeler, J., observes: "It must be conceded that, according to this testimony, the conduct of the defendant was highly improper, and perhaps sufficient to subject him to a conviction for an aggravated assault; but: however reprehensible his conduct, we are constrained to say that the testimony utterly fails to show any attempt on his part to employ any force whatever in the accomplishment of his purpose, whatever that may have been."

These decisions proceed on the well-established rule in criminal cases, that the proof is insufficient to warrant a verdict of guilty if the conduct of the accused is, upon a reasonable hypothesis, consistent with his innocence. If the evidence raises a mere suspicion, or, admitting all it tends to prove, defendant's guilt is left in uncertainty, or dependent upon conjecture or probabilities, the court should instruct the jury to acquit. The evidence should be of such character as to overcome, *prima facie*, the presumption of innocence. It appears that the defendant put his hands lightly on the woman's shoulders, followed her silently about sixty feet, making no threats or effort to stop her, or attempting any coercion, or doing anything calculated to put her in terror; and when she screamed and ran off, he ran in the opposite direction without attempting to detain her. These acts and conduct do not reasonably authorize the conclusion that defendant intended

to accomplish his purpose against her will, and by force if necessary. They are consistent with the theory that he expected to gratify his lustful desires with her consent. If the evidence be believed, it will be conceded that the conduct of the defendant was indecent and insulting, and subjected him to a conviction for an assault and battery; but it falls short of showing a felonious intent. The general affirmative charges asked by defendant are restricted to acquittal of the specific felony charged in the indictment, and should have been given: *State v. Massey*, 86 N. C. 658; 41 Am. Rep. 478; *Charles v. State*, 11 Ark. 389; in which cases the evidence was stronger and the circumstances more aggravating than in the present case.

Reversed and remanded.

ASSAULT WITH INTENT TO RAPE — WHAT CONSTITUTES THE OFFENSE.— A defendant has been held properly convicted of the crime of an assault with intent to commit rape, where the evidence showed that he intended to gratify his passions upon the person of a female, notwithstanding resistance on her part, and that she did not consent: *State v. Cross*, 12 Iowa, 66; 79 Am. Dec. 519, and note; or where it appeared that defendant laid hands upon a woman with intent to have sexual intercourse with her against her will, and she resisted for a time, but finally yielded: *State v. Hartigan*, 32 Vt. 607; 78 Am. Dec. 609; or where the prisoner is shown to have entered the room of a young lady while she was sleeping, by means of raising a window, and went to the bed, grasped her by the leg and hastily retreated, without any explanation of his conduct when she screamed: *State v. Boon*, 13 Ired. 244; 57 Am. Dec. 555; or where it is proved that defendant put his arms around the prosecutrix, forcibly holding and hugging her, making indecent proposals, and only released her when she screamed for assistance: *Norris v. State*, 87 Ala. 85; or where the assault was made by defendant upon a woman with intent to have connection with her, with present means of carrying out the intent, even though he did not actually touch her: *State v. Shroyer*, 104 Mo. 441; or where defendant abused the person of a female child under twelve years of age, with intent to have sexual intercourse with her: *Murphy v. State*, 120 Ind. 115.

ASSAULT WITH INTENT TO RAPE — WHAT DOES NOT CONSTITUTE. — One should not be convicted of the crime of assault with intent to commit rape, where it appears that he desired to have sexual intercourse with the prosecutrix, but merely committed a technical assault upon her person while urging his solicitations: *State v. Kendall*, 73 Iowa, 255; 5 Am. St. Rep. 679; or where the evidence showed that defendant, a father, uncovered the person of his daughter while she was sleeping; that he took indecent liberties with her person, and after she awoke attempted to persuade her to let him have connection with her, offering her money and laying upon her; but that she having refused his request, defendant did not further persist, but left her: *Commonwealth v. Merrill*, 14 Gray, 415; 77 Am. Dec. 336; or where it appeared that the prosecutrix was alone, and defendant followed her at a distance of seventy-five yards, shouting at her to stop, but she ran on until she came up with another woman, when defendant stopped: *State v. Massey*, 86

N. C. 658; 41 Am. Rep. 478; overruling *State v. Neely*, 74 N. C. 423; 21 Am. Rep. 496; or where defendant, a negro, followed a woman a little distance, who was riding alone on horseback along the highway, then ran up to her and caught her riding-skirt with one hand, but ran away when she urged up her horse, and escaped: *Green v. State*, 67 Miss. 356; or where a mere verbal request is shown to have been made by defendant upon a girl under twelve years of age: *State v. Harney*, 101 Mo. 470; or where an assault is shown to have been committed merely with the intent to have sexual intercourse, not against her resistance, but by stealth and with her consent: *Passmore v. State*, 29 Tex. App. 241; or where defendant is shown to have thrown the prosecutrix down, laid upon her, and performed indecent acts upon her, but held her down with intent to overcome her, but not to forcibly have sexual connection with her: *People v. Manchego*, 80 Cal. 306.

STITT v. STATE.

[91 ALABAMA, 10.]

CRIMINAL LAW — MURDER — RES GESTÆ — EVIDENCE. — In a trial for murder, where the evidence shows that the accused, after being knocked down by the deceased, armed himself, and, returning in from two to five minutes, shot and killed the deceased upon the renewal of the quarrel, the particulars of the whole transaction are admissible in evidence as being parts of the *res gestæ*, although, strictly speaking, all that occurred did not form one continuous transaction.

CRIMINAL LAW — MURDER. — EVIDENCE OF FORMER DIFFICULTY AND OF THREATS made in connection therewith are admissible on the part of the prosecution in a trial for murder, although the particulars of such difficulty are not admissible.

PRACTICE. — GENERAL OBJECTION TO EVIDENCE, part of which is admissible, is properly overruled.

PRACTICE. — REFUSAL TO GIVE SPECIAL INSTRUCTIONS asked is not error, unless each of them asserts a correct proposition of law.

CRIMINAL LAW — MURDER — SELF-DEFENSE — BORDEN OF PROOF. — To substantiate a plea of self-defense, the burden is on the accused to negative a reasonable and safe avenue of escape from the danger which threatened him.

TRIAL of an indictment for manslaughter. Verdict of guilty. The evidence tended to show that defendant, Stitt, and the deceased, Oliver, were on friendly terms, and had lived together more than a year prior to the morning of the difficulty. On that morning the defendant went to the deceased, and asked him: "Why did you tell that tale on me?" The deceased replied: "Maybe you don't like it, and would like to whip me?" To which defendant answered: "No; we have always got along well together, and I don't want to fight you; besides, you could whip me"; and about five minutes afterward again asked deceased: "I want to know why

you told that tale on me." Thereupon the deceased cursed him, knocked him down, and beat him, when defendant at once ran away. One witness testified that defendant, as he ran off, said: "I am going to get my pistol, and kill him"; but other witnesses who were present, together with the defendant, positively denied that he made any such statement. Other testimony tended to show that defendant returned from two to five minutes after the first difficulty, with his pistol in his hand, but stopped when told to go back to work; that the deceased had then returned to work, and was about forty or fifty feet from him. This evidence in relation to the first quarrel was admitted, against the objections of defendant. The evidence further showed that the defendant, acting upon the advice given, went back to work, when the foreman of the men came up and asked him what was the matter. Deceased then came up to them, speaking roughly to the defendant, and drew back as if to strike. The foreman then threatened to discharge them if they quarreled further. He placed a hand on the shoulder of each of them, and at that instant the pistol was fired, and the deceased fell. The foreman saw nothing in the hands of deceased, nor did he see him strike; but he had turned away for an instant, and when he turned back the deceased had knocked defendant down, had taken his pistol from him, and was beating him. The defendant testified that deceased struck him with a piece of iron prior to the shooting. Other witnesses testified that deceased approached with a piece of iron in his hand, but others swore that if such were the fact he threw the iron away before he reached deceased.

Knox and Bowie, for the appellant.

William L. Martin, attorney-general, for the state.

MCCLELLAN, J. It appears from the bill of exceptions that the "defendant objected to all questions asked witness about the first difficulty, and the court overruled his exceptions, to which the defendant duly excepted." Whether the "first" difficulty thus referred to was not in point of fact only a part of one continuous transaction is not very clear from the record; but, upon the whole testimony, we are of the opinion that all that occurred between the parties leading up to and culminating in the killing was within the *res gestæ* of the act charged, and therefore properly allowed to go to the jury. *Smith v. State*, 88 Ala. 73; *Martin v. State*, 89 Ala. 115.

The concession, however, that such was not the case —

that the first difficulty was not a part of the *res gestæ* of the homicide — will not avail the appellant. It was clearly competent for the state to prove a former difficulty, and any threats made in connection therewith, though not the particulars of it: *Lawrence v. State*, 84 Ala. 424; *Ross v. State*, 62 Ala. 224. What the witness said “about the first difficulty” embraced not only the fact of such difficulty, but threats therein made by the defendant against the deceased. The objection went to the whole evidence, and, if allowed, would have excluded this clearly competent testimony, as well as that which gave the particulars of the former difficulty. Under our uniform rulings, it was properly overruled on this ground, if not on the first consideration adverted to: *Lawrence v. State*, 84 Ala. 424; *Lowe v. State*, 88 Ala. 8; *Badders v. Davis*, 88 Ala. 367; *Coleman v. State*, 87 Ala. 14; *Marks v. State*, 87 Ala. 99.

The only other exception reserved is thus presented by the bill of exceptions: “The defendant asked that the following special charges, in writing, be given to the jury, and the court refused the same, to which refusal the defendant duly excepted.” This is manifestly the reservation of but one general exception to the refusal of the court to give several charges, — five in number, — and will not avail the appellant, unless each one of the instructions so requested asserts a correct proposition of law: *Bedwell v. Bedwell*, 77 Ala. 587; *East Tennessee etc. R. R. Co. v. Cary*, 81 Ala. 159; *Ins. Co. v. Moog*, 81 Ala. 385; *Stevenson v. Moody*, 83 Ala. 418; *Black v. Pratt etc. Co.*, 85 Ala. 504.

The first of these charges is in the following language: “If the jury are satisfied from the evidence that defendant acted in self-defense, then the burden of proof is upon the state to show to a moral certainty, and to the exclusion of any reasonable doubt, both the fact that the defendant brought on the difficulty, and to a moral certainty, and beyond all reasonable doubt, that retreat would have been safe; and if the jury have a reasonable doubt upon these two last propositions, or either of them, then defendant was not guilty, and they must acquit.” This instruction is self-contradictory and confusing, in that it assumes that self-defense may be made out without proof that no safe retreat was open to defendant; and it is affirmatively bad in casting upon the prosecution the burden of proving that the defendant could have safely retreated. This is not the law. To the substantiation of the plea of self

defense, it is upon the defendant to negative a reasonable and safe avenue of escape from the danger which threatens him. Such proof is an essential element of the right to take life, that life may be preserved: *Cleveland v. State*, 86 Ala. 1; *Gibson v. State*, 89 Ala. 121.

It is unnecessary to determine whether the remaining charges embraced in this general exception are good or bad, abstractly considered. Whether they were sound or not, the result of this appeal must be the same. We may say, however, that at least three of the remaining four requests were faulty.

Affirmed.

CRIMINAL LAW — HOMICIDE — EVIDENCE — RES GESTÆ. — Acts and declarations of the accused, made just before the crime, tending to explain the principal act, may be admitted as a part of the *res gestæ*: *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22, and note; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49, and extended note; *State v. Elvins*, 101 Mo. 243; *Cleveland v. Stilwell*, 75 Iowa, 466; *Seams v. State*, 84 Ala. 410; *Smith v. State*, 88 Ala. 73.

CRIMINAL LAW — EVIDENCE — THREATS OF ACCUSED. — Evidence of threats made by the accused against the deceased are admissible in evidence: *Cheatam v. State*, 67 Miss. 335; 19 Am. St. Rep. 310, and note; *People v. Brown*, 76 Cal. 573; *State v. Harrod*, 102 Mo. 590; *State v. Glahn*, 97 Mo. 679; *Babeock v. People*, 13 Col. 515; *Cleveland v. State*, 86 Ala. 1; *Cribbs v. State*, 86 Ala. 613; *Griffin v. State*, 90 Ala. 596.

CRIMINAL LAW — HOMICIDE — SELF-DEFENSE — BURDEN OF PROOF. — The burden of proof is on the defendant to show a necessity on his part to take life in self-defense: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96, and note; *Hatchard v. State*, 79 Wis. 357, as to abortion to save mother's life.

ALLEN v. STATE.

[91 ALABAMA, 12.]

CRIMINAL LAW — LARCENY OF LOST PROPERTY. — Where children have found lost property, and, with no intent to steal it, have delivered it to their father, who took it, knowing that it was lost property, and with the felonious intent to appropriate it to his own use, he is guilty of larceny. In such case, whether or not the father is guilty of larceny must be determined by the same principles which govern in the case of the actual finder.

CRIMINAL LAW — LARCENY OF LOST GOODS. — Lost goods are the subject of larceny, and the place where found is immaterial. The owner is not divested of the right of property by its loss at any place, and has, constructively, the right to its possession.

CRIMINAL LAW — LARCENY OF LOST PROPERTY — INTENT. — In order to stamp the conduct of the finder of lost chattels with larcenous character, the intent to convert them absolutely to his own use must co-exist with the act of finding. If such intent does not exist at the time of

finding, a subsequent concealment or fraudulent appropriation does not constitute larceny.

CRIMINAL LAW — LARCENY OF LOST PROPERTY — INTENT. — The existence of a criminal intent to commit larceny by the finder of lost property is ascertained by a careful examination of the facts and circumstances preceding, attending, and following the finding; and in order to ascertain the original intent, inquiries may be made as to the manner in which the finder conducted himself with the property, and his existing means of knowing or of ascertaining the owner.

CRIMINAL LAW — LARCENY OF LOST GOODS — INTENT — DUTY TO RESTORE. — Although the appropriation of lost goods to his own use by the finder is not larceny, when there are no *indicia* indicating the owner, and the finder really believes he cannot be found, yet if at the time of the taking he knew the owner, or had reasonable grounds for believing he could be discovered, it was his duty to hold and restore the goods to the owner. If, instead of so doing, he appropriates them to his own use, excluding the dominion of the owner, it is larceny. Reasonable belief that the owner can be found may result from previous knowledge, or from attending facts, or from facts learned at the time of the finding, or from any marks or *indicia* on the goods furnishing immediate means of ascertaining the owner.

CRIMINAL LAW — LARCENY OF LOST GOODS — INTENT. — Where the finder of lost goods has a criminal intent to convert them to his own use at the time of the finding, and afterwards does so convert them in pursuance of such intent, an idle effort made in the mean time for the ostensible purpose of finding the owner does not purge the taking of its criminality.

CRIMINAL LAW — LARCENY OF LOST GOODS. — The finder of a lost pocket-book containing money and papers, the latter furnishing reasonable means of discovering the owner, is under obligation to use due diligence to discover him, and his failure to do so, and subsequent appropriation of the property to his own use, is larceny.

John H. Disque, for the appellant.

William L. Martin, attorney-general, for the state.

CLOPTON, J. The charge to the refusal of which the first exception is taken asserts the naked proposition that if the money for the larceny of which defendant is indicted was found by his children and delivered to him, he cannot be guilty of larceny, whatever may have been his intent at the time of taking the money. Finding it, and its delivery to the defendant by the finder, did not deprive the money, as to the owner, of the character or *status* of lost property; the ownership remained in him, drawing to it, constructively, the right of possession. When defendant took the money from his children, he knew it had been lost, and took it as such. It is manifest the children had no felonious intent, and properly delivered the money to their father for his disposition. By receiving it from his children, knowing it was lost, de-

findant assumed, in legal contemplation, by voluntary substitution, as to the money and the owner, the relation occupied by the finders, placing himself in their stead. Otherwise a person knowingly receiving lost property from the finder, who had no intent to steal, with the felonious intent to appropriate it to his own use, escapes punishment. In such case, whether or not the person taking the money is guilty of larceny must be determined on the same principles which govern in the case of the actual finder.

These principles have been so thoroughly and elaborately discussed in *Griggs v. State*, 58 Ala. 425, 29 Am. Rep. 762, which is in accord with the great weight of authority, that it will suffice to state them substantially in the language of the opinion, without elucidating or fortifying them by other argument. The following propositions are clearly established: 1. Lost goods are the subject of larceny, and the place where found is immaterial. The owner is not divested of the right of property by the loss at any place, and has, constructively, the right of possession; 2. In order to stamp the conduct of the finder with larcenous character, the intent to convert them absolutely to his own use must co-exist with the act of finding. If such intent does not exist at the time of the finding, a subsequent concealment or fraudulent appropriation does not constitute larceny; 3. The existence of the criminal intent may be ascertained, like the intent with which any other act is done, by a careful examination of the facts and circumstances preceding, attending, and following the finding. In order to ascertain the original intent, inquiries may be made as to the manner in which the finder conducted himself with the goods, and his present means of knowing or ascertaining the owner; 4. Though the taking is not larceny, when there are no *indicia* indicating the owner, and the finder really believes he cannot be found, yet if at the time of the taking he knew the owner, or had reasonable grounds for believing he could be discovered, it is his legal and moral duty to hold and restore the goods to the rightful owner; and if, under such circumstances, he absolutely appropriates them to his own use, excluding the dominion of the owner, it is larceny. Reasonable belief that the owner can be found may result from previous knowledge, or from the attending facts and circumstances, or from facts he learns at the time of the finding, or from any marks or *indicia* on the goods furnishing immediate means of ascertaining the owner.

It follows from the foregoing principles that, to authorize the conviction of defendant, the evidence should show the existence of the criminal intent at the time his children handed him the money. As the record does not show to the contrary, we must presume that the court instructed the jury in accordance with these principles.

The second exception relates to the refusal to charge to the effect that if defendant took the money to the house of Kit Harper, a neighbor, for the purpose of finding out the owner, and afterwards converted it to his own use, no matter with what intent, he cannot be convicted. Carrying the money to Harper's house, and all then and there done and said, may be properly considered in ascertaining the intent with which he took the money from the children. If at that time he had the criminal intent, and afterwards converted it to his own use in pursuance of such original intent, merely taking the money to Harper's house in the mean time, for the ostensible purpose of finding out the owner, does not purge the taking of criminality. The charge was calculated to direct the minds of the jury to other considerations than the original intent, and thereby to mislead them.

The third and last exception goes to the refusal of the court to instruct the jury that defendant "was not bound to find out the owner, even if by diligence he could do so, if there were no marks, signs, or circumstances, understood by him, on the money, to enable him to discover the owner." The money was in a pocket-book, which contained other papers, and which was accidentally dropped from the pocket of an overcoat, while the owner, Anthony B. Green, Jr., was riding along the road, who, just before reaching home, met defendant's children. In the pocket-book were two promissory notes on T. B. Scott. By the charge, the jury would have understood that they could not find the existence of the criminal intent at the time of taking, unless there were marks or signs on the money which enabled the defendant to find out the owner. It restricts the immediate means of ascertaining the owner within too narrow limits. Conceding there were no signs or marks on the money, if there was any mark or writing on any of the papers in the pocket-book which reasonably furnished the immediate means of discovering the owner, this is sufficient. From the fact that, in the interview at Harper's house, defendant's wife, who could read, called over all the names of the Greens, and that one of the

notes on T. B. Scott was read and examined, the jury may have inferred that there was something on some of the papers which indicated that the owner was named Green.

We discover no error in the record.

Affirmed.

LARCENY OF LOST PROPERTY. — As to what constitutes the crime of larceny as committed by the finder of lost property, see note to *Reed v. State*, 34 Am. Rep. 734, 735; *Commonwealth v. Titus*, 116 Mass. 42; 17 Am. St. Rep. 188, and note 140, 141; note to *State v. Homes*, 57 Am. Dec. 283, 284; *Robinson v. State*, 11 Tex. App. 403; 40 Am. Rep. 790; *Hunt v. Commonwealth*, 13 Gratt. 757; 70 Am. Dec. 443. To constitute the crime of larceny by a finder of lost property, he must have known who was the owner at the time of finding, or must have been in possession of some information which might reasonably enable him to discover the owner, and he must have appropriated the property with intent to take absolute dominion over it: *Parris v. Commonwealth*, 57 Va. 554.

JACKSON v. STATE.

[VI ALABAMA, 58.]

CRIMINAL LAW — LARCENY — SUFFICIENCY OF INDICTMENT. — An "attempt" implies both an intent and an actual effort to consummate the intent. Hence an indictment charging an "attempt" to commit larceny is sufficient, without alleging the particular acts constituting the "attempt."

CRIMINAL LAW — JUDGMENT WITHOUT PLEA IS REVERSIBLE ERROR. —

There can be no trial on the merits nor a conviction in a criminal case until the accused has pleaded not guilty, or this plea has been entered for him by the court. If the record fails to show that such plea has been made or entered, the judgment will be reversed.

Peach and Evans, for the appellant.

William L. Martin, attorney-general, for the state.

COLEMAN, J. The record presents the question as to the sufficiency of the indictment. The indictment charges that Andrew Jackson "did attempt to feloniously take and carry away," etc. Mr. Wharton seems to hold that, at common law or in the absence of statutory provision, in an "indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act, to be averred, which, directed by a particular intent, would have apparently resulted, in the ordinary course of things, in a particular crime": Wharton's Crim. Law, sec. 192. He further holds that it is in the power of the legislature to pass statutes declaring a particular act to be indictable, and providing that it shall be enough to describe such act in the statutory terms. When this is done,

it is proper for the courts to hold that "an indictment charging that the defendant did attempt to feloniously steal from the house of A B is good": 1 Wharton's Crim. Law, sec. 191.

The word "attempt" is among the adjudged words, and in this state has a defined legal meaning. "An attempt implies more than an intention formed. It means to make an effort, or endeavor, or an attack": *Gray v. State*, 63 Ala. 73. An "attempt" implies an intent, and an actual effort to consummate the intent or purpose; "to try": *Bordeaux v. Davis*, 58 Ala. 612; *Prince v. State*, 85 Ala. 867; *Lewis v. State*, 35 Ala. 381. The reason assigned by Mr. Wharton, in his excellent work, why an indictment is defective which charges merely an "attempt" to commit an offense, without an averment of any act, is, that "attempts" may be merely "in conception or in preparation," "with no causal connection between the attempt and the crime"; that it is a term "peculiarly indefinite," "without any prescribed meaning," "and covers acts some of which are indictable and some are not," and therefore he concludes all mere attempts are not indictable: 1 Wharton's Crim. Law, secs. 190, 192. If Mr. Wharton's definition is correct, his conclusions legitimately follow; but if "attempt" implies both an intent and an actual effort to consummate the intent, as held in this state, an indictment for an "attempt" to commit an offense is not indefinite, and does not charge any act not penal. The reason given by him would apply with equal force in cases where "attempts" were made indictable by statute, if, as is generally the case, the statute omits to legally define what acts amount to an "attempt." The principle upon which an indictment which merely charges an "attempt" to commit an offense is held good is, that the word "attempt" has a legal meaning,—is an adjudged word,—and therefore, when a person is indicted for an "attempt," he, in law, is as fully advised of what the indictment charges as if the statute had defined with precision the acts necessary to constitute an "attempt."

The statutes of this state have changed the common-law rules of criminal pleading, dispensing with many averments which were regarded as indispensable, reducing indictments rather to a statement of legal conclusions than of facts: *Drake v. State*, 60 Ala. 62. The code (sec. 4366) declares the forms given in the code are sufficient in all cases in which they are applicable; in other cases, forms may be used as near similar as the nature of the case and the rules prescribed in this

chapter will permit. "The indictment must state the facts constituting the offense, in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended," etc.: Code, sec. 4368.

We have no statutory definition of an "assault." An indictment for a simple assault is good which merely charges that A B assaulted C D. At common law it would have been necessary to have averred the acts done constituting the assault: *Beasley v. State*, 18 Ala. 535; *Trexler v. State*, 19 Ala. 21; *Bordeaux v. Davis*, 58 Ala. 612. Conspiracy has no statutory definition. An indictment charging that A B and C D conspired together to unlawfully do an act in itself indictable, describing the unlawful act, is sufficient: Crim. Code, 269. Such an indictment, under the decisions of this state, is wholly insufficient as a common-law indictment for a conspiracy: *Miles v. State*, 58 Ala. 390. The same is true as to an affray.

In framing indictments, the statute authorizes the use of forms, "in other cases, as near similar as the nature of the case and the rules prescribed will admit." An indictment which charges an "attempt to feloniously take and carry away five dollars," etc., sufficiently states the facts to enable a person of common understanding to know that he is charged with having had a felonious intent to take and carry away the property, and, in consummation of that intent, he made an actual effort, — "tried" to consummate the felonious intent. If the defendant had been indicted for the larceny of the money, and the proof had failed to show the larceny, but had shown some "effort" or "trial" of the defendant to commit the larceny, he might have been convicted of the attempt: *Wolf v. State*, 41 Ala. 412. The indictment for the larceny includes every "active effort" or "trial" to consummate the larceny, without particularizing them; and for this reason the conviction for an attempt to commit the offense is permissible under an indictment charging the offense. An indictment which charges an "attempt" to commit the larceny certainly gives the defendant the same information as to the facts of the offense for which he is put on trial as an indictment for the offense itself: *Lewis v. State*, 35 Ala. 381; *State v. Hughes*, 76 Mo. 323; *People v. Bush*, 4 Hill, 133. We hold the indictment to be sufficient.

We find an error in the record which compels a reversal upon other grounds. The record fails to show that the de-

defendant pleaded to the indictment, or, standing mute, the court caused the plea of not guilty to be entered for him. The judgment entry, after the demurrer to the indictment was overruled, recites that thereupon came a jury, etc., who upon their oaths do say, etc. There was no plea entered and no issue joined.

There can be no trial on the merits in a criminal case until the defendant has pleaded not guilty, or this plea has been entered for him by the court: *Fisher v. State*, 46 Ala. 723; *Socovitch v. State*, 46 Ala. 227; *Fernandez v. State*, 7 Ala. 511; 1 Bishop's Crim. Proc., sec. 468.

Reversed and remanded. —

CRIMINAL LAW — ATTEMPT TO COMMIT A CRIME. — As to what constitutes the crime of attempting to commit a crime, and the requisites of an indictment charging such an offense, see extended note to *People v. Moran*, 20 Am. St. Rep. 741-748.

CRIMINAL LAW — NECESSITY OF ARRAIGNMENT AND PLEA. — A judgment of conviction of a felony will be reversed, unless the record shows a plea or issue, notwithstanding the defendant was personally present at the trial: *Hill v. State*, 1 Yerg. 76; 24 Am. Dec. 441; *Hoskins v. People*, 84 Ill. 87; 26 Am. Rep. 433.

LOUISVILLE AND NASHVILLE R. R. Co. v. HALL.

[91 ALABAMA, 112.]

RAILROADS. — THE REQUIREMENT THAT AN ENGINEER SHALL BLOW A WHISTLE OR RING A BELL before reaching a public road or crossing is for the protection of persons who, being at a crossing, are about to pass across the track. Hence a brakeman injured at a crossing cannot recover therefor on the ground that the failure to blow the whistle or ring the bell left him without warning of the approach of the train to the crossing, and thereby caused him to be injured.

PRACTICE. — DEMURRER TO A PART OF A COUNT will not be entertained, unless the imperfect part is so material as that, being eliminated, it leaves the count without a valid cause of action.

DISCOVERY. — NO ONE CAN BE REQUIRED TO CRIMINATE HIMSELF. — Hence, even in civil proceedings, a material fact cannot be elicited by discovery from the adverse party, if by discovering it he would be exposed to a criminal prosecution or to a penal recovery; but under the code of Alabama "the party is bound to answer all pertinent interrogatories, unless by the answer he subjects himself to a criminal prosecution."

PRACTICE. — A PARTY IS NOT ENTITLED TO HAVE ANSWERS SUPPRESSED, if they are in response to interrogatories to which he interposed no objection, and to which he propounded cross-interrogatories.

RAILWAY CORPORATION MAY BE EXCUSED FOR MAINTAINING A BRIDGE SO LOW AS TO ENDANGER ITS EMPLOYEES, if the irregularity of the ground's surface and the state of the neighboring improvements were

such that the bridge could not be raised without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors, or without too great an expense to the corporation. Therefore a jury should consider all these matters in determining whether or not the corporation was negligent in maintaining the bridge so low as it did.

EVIDENCE OF PRIOR INJURIES SUFFERED BY BRAKEMEN FROM CROSSING UNDER A LOW BRIDGE is admissible to aid the jury in determining whether the railroad corporation maintaining such bridge had, through its officials, notice of the injuries previously done, and had been guilty of negligence in thereafter maintaining the bridge at the same elevation.

RAILROADS ARE NOT REQUIRED TO ADOPT EVERY APPLIANCE which even a majority of the well-regulated roads have adopted. Something must be accorded to diversity of judgment; and the failure to adopt a particular appliance cannot be regarded as *per se* recklessness or negligence, though the majority of the other roads have adopted it.

RAILROADS — THE FAILURE TO MAINTAIN WHIPPING-STRAPS to warn brakemen who are on top of the train that it is about to pass under a bridge so low as to imperil their lives is not legal negligence, unless such straps are so manifestly serviceable as to command the consensus of intelligent railroad men, and such men do not honestly differ in judgment as to their utility.

CROSS-EXAMINATION OF A WITNESS SHOULD NOT BE PERMITTED WHEN IT TENDS TO MULTIPLY THE ISSUES so as to embarrass, if not to mislead, the jury. Hence when a witness has testified to the use and usefulness of whipping-straps as cautionary signals, a cross-examination is not proper which requires the witness to testify to the rule and habit of railroads in many states, to injuries inflicted by overhead, low bridges, to roads being mulcted in damages in consequence of such injuries, and their subsequently adopting whipping-straps.

EVIDENCE — A PHOTOGRAPH HAVING BEEN RECEIVED IN EVIDENCE without any testimony as to its correctness or of the point of view from which it was taken, and the court, not being able to agree upon its admissibility, "hold it admissible for what it was worth."

RAILROADS — LOW BRIDGE — CONTRIBUTORY NEGLIGENCE. — If a brakeman is reasonably notified of a low bridge, this puts him on the lookout and on inquiry and observation, and if he fails in this duty, when such observation would have enabled him to know where the bridge was located, he is guilty of contributory negligence, and cannot recover if injured on account thereof.

RAILROAD IS GUILTY OF NEGLIGENCE IN MAINTAINING A BRIDGE SO LOW AS TO IMPERIL THE LIVES OF ITS EMPLOYEES, if it might have been raised above the danger line without great expense, and without too great inconvenience and injury to the public or to adjacent property-holders affected thereby.

RAILROADS. — FAILURE TO PUT UP BULLETIN-BOARDS AND PLACARDS WARNING EMPLOYEES OF DANGER is immaterial, if they were expressly warned of the same danger by some other means.

ACTION to recover damages for personal injuries. The general charge, together with exceptions 1 and 2, mentioned in the opinion, was as follows: "Should the jury find from the evidence that the bridge was so low as to be dangerous to

brakemen standing on the top of freight-cars, but that from the nature of the case it could not be built higher without unreasonable inconvenience to the public or unreasonable expenses to the company, and that therefore it was not negligence on the part of the defendant to build the bridge at the height at which it was built, yet it would be the duty of the defendant to give, or cause to be given, to its employees due notice of the danger, [No. 1] *and to make use of such means as prudent persons engaged in the same or like business would employ; and if the defendant did not give such notice to plaintiff, or cause the same to be done, this would be negligence on the part of the defendant, and plaintiff would be entitled to recover, if he suffered injury as the proximate result of such negligence, and was without fault on his part. . . .* If the jury should believe from the evidence that the bridge was so low as to be dangerous to brakemen standing on the top of freight-cars, but that, on account of the surroundings, it could not be built higher without unreasonable inconvenience to the public or unreasonable expense to the railroad, and the defendant gave plaintiff due notice of the danger, [No. 2] *the plaintiff cannot recover, unless you further find that prudent persons engaged in the same or a like business, under the same or like circumstances, would have made use of whipping-straps or other devices to notify brakemen of danger, in which event they should find for the plaintiff, if they further find that the absence of whipping-straps or other devices proximately caused the injury, without fault on the part of the plaintiff.*" To portions of this charge the defendant reserved exceptions, as follows: "The defendant excepted specially to the following portion of said charge," namely, the italicized words marked "No. 1." "Thereupon the court stated to the jury, orally, that they should consider said portion of said charge as if the word 'ordinarily' was written before the word 'employ.' Thereupon defendant excepted to said portion of said charge given with said qualification, as above stated. The defendant also excepted to the following portion of said charge," namely, the italicized words marked "No. 2." "The court then stated to the jury, orally, that they should consider said portion of said charge excepted to as if the word 'ordinarily' were written in after the words 'business would'; and the defendant excepted to that portion of said charge given with said qualification and instructions as above stated."

such that the bridge could not be raised without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors, or without too great an expense to the corporation. Therefore a jury should consider all these matters in determining whether or not the corporation was negligent in maintaining the bridge so low as it did.

EVIDENCE OF PRIOR INJURIES SUFFERED BY BRAKEMEN FROM CROSSING UNDER A LOW BRIDGE is admissible to aid the jury in determining whether the railroad corporation maintaining such bridge had, through its officials, notice of the injuries previously done, and had been guilty of negligence in thereafter maintaining the bridge at the same elevation.

RAILROADS ARE NOT REQUIRED TO ADOPT EVERY APPLIANCE which even a majority of the well-regulated roads have adopted. Something must be accorded to diversity of judgment; and the failure to adopt a particular appliance cannot be regarded as *per se* recklessness or negligence, though the majority of the other roads have adopted it.

RAILROADS. — THE FAILURE TO MAINTAIN WHIPPING-STRAPS to warn brakemen who are on top of the train that it is about to pass under a bridge so low as to imperil their lives is not legal negligence, unless such straps are so manifestly serviceable as to command the consensus of intelligent railroad men, and such men do not honestly differ in judgment as to their utility.

CROSS-EXAMINATION OF A WITNESS SHOULD NOT BE PERMITTED WHEN IT TENDS TO MULTIPLY THE ISSUES so as to embarrass, if not to mislead, the jury. Hence when a witness has testified to the use and usefulness of whipping-straps as cautionary signals, a cross-examination is not proper which requires the witness to testify to the rule and habit of railroads in many states, to injuries inflicted by overhead, low bridges, to roads being mulcted in damages in consequence of such injuries, and their subsequently adopting whipping-straps.

EVIDENCE. — A PHOTOGRAPH HAVING BEEN RECEIVED IN EVIDENCE without any testimony as to its correctness or of the point of view from which it was taken, and the court, not being able to agree upon its admissibility, "hold it admissible for what it was worth."

RAILROADS — LOW BRIDGE — CONTRIBUTORY NEGLIGENCE. — If a brakeman is reasonably notified of a low bridge, this puts him on the lookout and on inquiry and observation, and if he fails in this duty, when such observation would have enabled him to know where the bridge was located, he is guilty of contributory negligence, and cannot recover if injured on account thereof.

RAILROAD IS GUILTY OF NEGLIGENCE IN MAINTAINING A BRIDGE SO LOW AS TO IMPERIL THE LIVES OF ITS EMPLOYEES, if it might have been raised above the danger line without great expense, and without too great inconvenience and injury to the public or to adjacent property-holders affected thereby.

RAILROADS. — FAILURE TO PUT UP BULLETIN-BOARDS AND PLACARDS WARNING EMPLOYEES OF DANGER is immaterial, if they were expressly warned of the same danger by some other means.

ACTION to recover damages for personal injuries. The general charge, together with exceptions 1 and 2, mentioned in the opinion, was as follows: "Should the jury find from the evidence that the bridge was so low as to be dangerous to

brakemen standing on the top of freight-cars, but that from the nature of the case it could not be built higher without unreasonable inconvenience to the public or unreasonable expenses to the company, and that therefore it was not negligence on the part of the defendant to build the bridge at the height at which it was built, yet it would be the duty of the defendant to give, or cause to be given, to its employees due notice of the danger, [No. 1] *and to make use of such means as prudent persons engaged in the same or like business would employ; and if the defendant did not give such notice to plaintiff, or cause the same to be done, this would be negligence on the part of the defendant, and plaintiff would be entitled to recover, if he suffered injury as the proximate result of such negligence, and was without fault on his part. . . .* If the jury should believe from the evidence that the bridge was so low as to be dangerous to brakemen standing on the top of freight-cars, but that, on account of the surroundings, it could not be built higher without unreasonable inconvenience to the public or unreasonable expense to the railroad, and the defendant gave plaintiff due notice of the danger, [No. 2] *the plaintiff cannot recover, unless you further find that prudent persons engaged in the same or a like business, under the same or like circumstances, would have made use of whipping-straps or other devices to notify brakemen of danger, in which event they should find for the plaintiff, if they further find that the absence of whipping-straps or other devices proximately caused the injury, without fault on the part of the plaintiff.*" To portions of this charge the defendant reserved exceptions, as follows: "The defendant excepted specially to the following portion of said charge," namely, the italicized words marked "No. 1." "Thereupon the court stated to the jury, orally, that they should consider said portion of said charge as if the word 'ordinarily' was written before the word 'employ.' Thereupon defendant excepted to said portion of said charge given with said qualification, as above stated. The defendant also excepted to the following portion of said charge," namely, the italicized words marked "No. 2." "The court then stated to the jury, orally, that they should consider said portion of said charge excepted to as if the word 'ordinarily' were written in after the words 'business would'; and the defendant excepted to that portion of said charge given with said qualification and instructions as above stated."

Gaylord B. Clark and F. B. Clark, for the appellant.

Greg. L. and H. T. Smith, and R. Inge Smith, for the appellee.

STONE, C. J. When this case was before us at a former term (*Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 13 Am. St. Rep. 84) we ruled on demurrers to the several counts of the complaint, and pointed out defects in each of them. The imperfections in several of them were slight. When the case returned to the city court, the first, sixth, and ninth counts were so amended as to conform to our views. Demurrers were interposed to the amended counts, reassigning many of the grounds assigned to the originals, and adding new ones. These demurrers were overruled, and we think rightly. Each of these counts as amended presents a *prima facie* cause of action within the rules of pleading which prevail in this state. Very great technicality is not required with us. Certainty to a common intent is enough.

The plaintiff, under leave of the court, added four new counts to his complaint. These were severally demurred to, and the court held the twelfth and thirteenth counts to be sufficient. For the reasons stated above, we hold each of these counts good.

Appellant's criticism of count 18 does not take in its whole scope. It contains this averment: "But defendant, after it obtained the management and control of said railroad, negligently failed to maintain such whipping-straps, or gallows and ropes, or other devices, although they were an effective and proper means of giving warning to defendant's freight-brakemen, and other employees upon its freight trains, of their approach to said bridge, and negligently allowed the same to rot down, or be removed, and negligently failed to provide any other sufficient means of informing said brakemen of their approach to said bridge, although it knew said bridge was of a height to be dangerous to such freight-brakemen, unless provided with whipping-straps, gallows and ropes, or some other similar and effective device, or would have known thereof by the exercise of reasonable diligence." This is an averment that whipping-straps, if maintained, would have been an effective and proper means of giving warning of the approaching peril, and that neither that nor any other means was employed for that purpose. This, as an averment, is sufficient.

To counts 12 and 13, the defendant pleaded, among other defenses, that the injury therein complained of did not occur within twelve months before the filing of said additional counts. This plea was demurred to, the ground alleged being that neither of them presented any new cause of action. This demurrer ought to have been sustained, but the record fails to show any ruling on it.

The fifth count of the complaint alleges as a breach of duty by the defendant the failure of the engineer to blow the whistle or ring the bell on the train, as by section 1144 of the code he was required to do, "before reaching any public road crossing." This was assigned as a special ground of demurrer; and inasmuch as the city court overruled the demurrer to this count, it must have held this ground of demurrer insufficient. On the former hearing of this case (*Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708, 718; 13 Am. St. Rep. 84) we ruled that this case does not fall within the provisions of that statutory requirement. We said: "Its [the statute] design was to warn and protect persons who, at a public crossing, pass across and directly on the track, and who would be in danger of being struck and run over by an approaching train." It is contended before us that the city court erred in not sustaining the demurrer to this part of the fifth count.

It is a general rule that a demurrer to a part of a count will not be entertained, unless the imperfect part is so material as that, being eliminated, it leaves the count without a valid cause of action. A seeming exception is recognized when the suit is on a penal bond, with more than one assignment of breach. In such action each breach is treated as a separate charge or count, and may be demurred to separately: *Hays v. Anderson*, 57 Ala. 374; *Copeland v. Cunningham*, 63 Ala. 394; *Flournoy v. Lyon*, 70 Ala. 308. The present suit does not fall within that class. The clause objected to is only one of several alleged cumulative acts of negligence, and if it be stricken out, the count will remain amply good. Security against the possible injurious effects a defendant may suffer from such irrelevant averment must be sought in a proper instruction to the jury. Demurrer cannot reach it. Possibly it should be stricken out as immaterial and impertinent, if moved for: *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58. We find no error in the rulings on the pleadings.

The plaintiff propounded to defendant interrogatories for

discovery, as provided by our statute: Code 1886, secs. 2816 et seq. Defendant objected to these interrogatories, and moved to suppress them, and also the answers to them. The court sustained this motion in part, and overruled it in part. The ruling of the court in permitting any of the testimony so obtained to go to the jury is assigned as error.

It is certainly the rule, in our system of jurisprudence, that no one can be required to criminate himself. The general expression is, that while in civil proceedings any fact material to the maintenance or defense of the suit may be elicited from the adversary by discovery, yet no one can be required to discover any fact which will expose him to a criminal prosecution or to a penal recovery: 2 Daniell's Chancery Practice, 1557; 2 Story's Eq. Jur., secs. 524 et seq., 575; 1 Pomeroy's Eq. Jur., secs. 191, 194, 201; 2 Am. & Eng. Ency. of Law, 201 et seq. In one case (*Glynn v. Houston*, 1 Keen, 320, 337) Lord Langdale said: "A bill of discovery cannot be sustained in aid of an action for a mere personal tort." Other authorities, however, extend this doctrine further than Lord Langdale's language would seem to justify. We base our judgment on the language of our statute (Code, sec. 2822), which declares that, under its provisions, "the party is bound to answer all pertinent interrogatories, unless by the answer he subjects himself to a criminal prosecution." There is nothing in this assignment of error.

One of the severely contested inquiries in the court below was, whether the bridge by striking against which the plaintiff was injured could have been raised higher above the track without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors affected by the change, or without too great expense to the railroad corporation. Many witnesses residing in or near Greenville—the bridge was at Greenville—were examined by deposition on this controverted question, and gave testimony *pro* and *con*. The testimony was taken on written interrogatories served and crossed. In propounding interrogatories, plaintiff inquired if there were not streets in Greenville, and public roads near by leading to Greenville, which had steeper grades than the approach to the bridge would be if the bridge was raised two feet higher. (If raised two feet, the bridge would probably be above the ordinary danger line.) No objection was filed to the interrogatories calling for this information, but defendant crossed the interrogatories

thus propounded. On the trial below, defendant moved to suppress the answers in reference to other streets and neighboring roads. The answers were strictly responsive to the interrogatories. The court overruled the motion, and admitted the testimony. This was excepted to, and is assigned as error. We need not decide whether this testimony was legal, if objected to at the proper time, although we know no rule that would justify its introduction. The objection came too late, and was rightly overruled: *Townsend v. Jeffries*, 24 Ala. 329; *Wilkinson v. Moseley*, 30 Ala. 562; *Walker v. Walker*, 34 Ala. 469.

Plaintiff received his injury by a collision with the low bridge immediately south of the depot at Greenville. He was brakeman on a freight train, and his post of duty, when the train was in motion, was on the top of the cars. When struck, he was walking back on the top of the cars to his proper place on the train. He was making his eighth trip over the road, having passed safely seven times under this bridge, but always in the night-time. It was night when he was injured, and he had his back to the bridge. Several witnesses testified that they had informed and cautioned him in regard to the low bridges, including this one at Greenville; and he admitted in his own testimony that he had been notified of the low bridges, but could not say whether he was notified of the one at Greenville. The company had posted notices of the low bridges, shown on its bulletin-boards, and in placards hung, under regulations, in the cabooses of the freight trains. Many exceptions were reserved to the court's rulings excluding testimony of the contents of the placards, and of the duty of the train-officers to keep them posted in the cabooses. There is nothing of merit in these exceptions; and if there were, a copy of the placard was put in evidence, and thus supplied the desired proof in an unexceptionable shape. The proper inquiry was, not what duty required of the officers of the train, but to what extent they performed that duty. It is neither a defense nor a condonation of an act of negligence that duty — commanded duty — required of the actor that he should be diligent. Nor was it material to inquire the meaning of the words "Fort Deposit and Greenville," found in the placard. The low bridge between those points, and notice of it, were immaterial inquiries in the present suit.

The witness Porterfield testified to general notoriety in Greenville of prior injuries suffered by brakemen in conse-

quence of the low bridge there. This was objected to, but the decision of the question was withheld. It is not shown that it was subsequently called to the attention of the court. Later in the trial, positive testimony of those prior injuries was given. This legalized Porterfield's testimony, not as evidence that those injuries had been inflicted, but as testimony to be weighed by the jury in determining whether the railroad company, through its officials, had notice of the injury previously done. This testimony, in both of its aspects, was material upon a single inquiry, namely, whether the defendant was guilty of negligence in maintaining the bridge at its then elevation. But in this inquiry it must not be forgotten that if the irregularity of the ground's surface, and the state of the neighboring improvements, were such that the bridge could not be raised without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors affected by its change, or without too great expense to the railroad corporation, either of these would furnish an excuse for not raising the bridge. Either of said categories would present a case where one convenience must yield somewhat to the conservation of another. This inquiry should be fairly presented to the jury, and carefully considered by them: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 18 Am. St. Rep. 84.

Very liberal rules should prevail as to the legitimate scope of cross-examination. Still, boundaries must be assigned to it. It should be never so indulged as to lead to a multiplication of issues having no direct bearing on the question at issue, and whose only effect will be to draw the minds of the jury from the main questions involved. We have said many times that railroads are not required to adopt every appliance which some roads, even a majority of the well-regulated, have incorporated into their system of management. Something must be accorded to diversity of judgment. If many well-regulated railroads abstain from adopting a particular appliance which other roads, even a majority, consider wise precautions and adopt, such abstention cannot be pronounced *per se* recklessness or negligence: *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494; *Georgia Pac. R'y Co. v. Propst*, 83 Ala. 518; *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269; *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708, 719; 18 Am. St. Rep. 84.

What we have said above has reference to whipping-straps as useful warning signals, so elaborately presented in

the record before us. The influence that device should exert as a factor in the decision of this case is not alone whether it is serviceable in giving notice of danger ahead. The testimony on this question is very widely variant. The inquiry is broader than this. Is it so manifestly serviceable as to command the consensus of intelligent railroad men so generally as that it cannot be reasonably ignored or disregarded? Or is its utility disbelieved and disallowed in the management of many well-governed and well-regulated railroads? If this question be reasonably debatable, and skilled railroad men honestly differ in judgment as to the utility of this or any other cautionary appliance, and differ to such extent as that many well-regulated railroads abstain from their use, then such abstention is not legal negligence.

We recur to the question of the scope of legitimate cross-examination. Defendant examined by deposition many railroad officials scattered over many states of the Union as to the use and usefulness of whipping-straps as cautionary signals. On cross-examination, plaintiff inquired as to the rule and habit in reference to such warnings practiced by some fifty or more railroads scattered over many of the states and in Canada. In reference to some of these roads the inquiry went further, and called for the disclosure of certain injuries inflicted by overhead, low bridges, — whether the railroad had been mulcted in consequence of such injuries, and whether they had not subsequently adopted whipping-straps as warning signals. These cross-interrogatories were objected to, and a motion made to suppress the testimony they elicited. All such testimony ought to have been excluded. Its tendency was to multiply the issues almost indefinitely, and to greatly embarrass, if not to mislead, the jury in their deliberations. In overruling the motion to suppress this part of the testimony the city court erred.

We hold, also, that the city court erred in allowing the letters of Metcalf, of the attorneys, and of the answers to such letters, to be put in evidence. There was nothing in them which should legitimately weaken the force of the witnesses testifying, and they could not be competent for any other purpose. If they had any influence, it was to prejudice the jury in their deliberations, while the correspondence, properly interpreted and understood, should not, in any respect, influence the verdict of the jury.

A photograph, exhibit P, was received in evidence against

the objection and exception of defendant. That photograph was material evidence only on the postulate that it furnished some aid in determining the grade of Milner Street at the point of its eastern approach to the bridge. The photographer was not examined as a witness, and there is no positive proof of the position he occupied when the picture was taken. Lane, and other witnesses familiar with the locality, state it is not a correct representation of the place, and some of them say they would not have recognized it from the picture. No witness testified that it was a correct representation. Is it not true that the correctness of such a picture, as an aid in determining the grade of the street, must depend largely on the position and elevation of the camera at the time it was taken? Can such a picture give a correct impression of grade, if taken longitudinally with the street, or at an acute angle? To be at all reliable on the inquiry of the grade, should not the camera be placed at a right angle with the street? But the court is not agreed on the question of its admissibility, and we therefore hold that it was admissible for what it was worth.

The general charge to the jury was given in writing at the request of the defendant. The first and second exceptions interposed to it by defendant were to certain segregated portions thereof, which the reporter will embody in the statement of facts as Nos. 1 and 2. The court thereupon stated, orally, that he inserted the word "ordinarily" in certain designated places in each portion of the charge excepted to. The alteration was not written. The defendant excepted, in the following language: "And the defendant excepted to that portion of said charge given with said qualification and instructions as above stated." It is contended before us that the city court erred in not correcting the writing, instead of making the correction orally. If this objection had been rested on the ground that the correction was not in writing, it is probable we would hold it well taken. It was due, however, to the trial court, that the true ground of objection should be stated. If that had been done, there is little if any doubt that the manuscript would have been then and there corrected. We decline to make this a ground of reversal: 3 Brickell's Digest, 80, secs. 83, 85.

The first charge given at the instance of plaintiff is faulty, in that it employs the word "knowledge" in several places, where "notice" meets all the requirements of the law. If be-

fore the collision, plaintiff was reasonably notified of the low bridge at Greenville, this "put him on the lookout and on inquiry and observation"; and if he failed in this duty, when its observance would have enabled him to know where the bridge was located, such want of knowledge was his own fault, and would constitute his ignorance contributory negligence: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 719, 720; 13 Am. St. Rep. 84; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140.

Whether or not there was any testimony which authorized the submission to the jury of the inquiry of exemplary, punitive, or vindictive damages was, and is, as we have stated above, one of the severely contested questions in this case. That question depends on another, namely, Was it practicable to raise the bridge above the danger line without too great inconvenience and injury to the public, or to adjacent property-holders affected thereby, and also without too great expense to the railroad corporation? Under the testimony, the first of these inquiries is the one of chief importance; for under all the testimony, the expense of erecting a new and higher bridge was too insignificant to be weighed in the balance against the peril to human life. Many witnesses gave testimony for and against the practicability of elevating the bridge, having reference to the street as a highway, and to the two public warehouses which lined the approach to the bridge. We feel safe to say, that, on the question of practicability, the testimony was in marked and palpable conflict.

If, under the rules of practicability stated above, the bridge could have been so raised as to allow a brakeman on the top of the cars in use to pass under it with absolute safety, then to fail to do so was negligence, and subjected the railroad company to the actual damages caused by the failure, unless there was proximate, contributory negligence. Under what conditions will the negligence become so increased and aggravated as to justify the imposition of greater damages by way of punishment than compensation for the actual injury sustained? On this question the court stands equally divided, two of the judges holding there is no testimony authorizing the jury to find that degree of negligence which justifies punitive damages, while the other two maintain there was enough testimony on that question to be considered by the jury. The question raised by the charges, whether there could be a recovery of vindictive damages in this case, is not decided: *Wilkinson v. Searcy*, 76 Ala. 176.

Bulletin-boards and placards are sometimes resorted to as methods of giving notice. They are not the only methods. If, before the injury, plaintiff was expressly notified of the low bridge in question, this answered all the purpose a bulletin-board or placard could accomplish. Charge 24, asked by defendant, should have been given.

This opinion must be interpreted in connection with our former ruling: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708-725; 13 Am. St. Rep. 84.

Reversed and remanded.

EVIDENCE — FORMER ACCIDENTS. — Evidence of former slips in machinery by which plaintiffs were injured, brought home to the knowledge of defendant, is admissible, as tending to prove that the machinery was insufficient, and that defendant did not exercise reasonable care in continuing its use: *Myers v. Hudson I. Co.*, 150 Mass. 125; 15 Am. St. Rep. 176.

RAILROADS — LOW BRIDGES — BRAKEMAN. — An employee of a railroad company has the right to assume that it has constructed and maintained its bridges in such a manner that as a brakeman upon its trains he can perform his duties with safety, and that if there is any such danger to be encountered in the service as a low bridge, he will be warned of it: *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note.

RAILROAD COMPANIES ARE NOT REQUIRED TO PROVIDE SUCH APPLIANCES as will insure their servants from injury, nor to adopt the very best and newest contrivances obtainable: *Augerstein v. Jones*, 139 Pa. St. 183; 23 Am. St. Rep. 174; note to *Ross v. Walker*, 23 Am. St. Rep. 165; *Galveston etc. R'y Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781.

DEMURRER, WHEN PROPERLY DENIED. — A demurrer to a bill for want of equity, if general, will be overruled, if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer: *El Modello O. Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537.

WITNESSES — PRIVILEGE. — A witness is not privileged from answering questions merely because by doing so he would be exposed to disgrace and infamy; it is necessary that it should expose him to the danger of conviction and punishment: *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851; see note to *Fries v. Brugler*, 21 Am. Dec. 55-62; *Mahank v. Cleland*, 76 Iowa, 401; *Sharon v. Sharon*, 79 Cal. 633.

HAYES v. WESTCOTT.

[91 ALABAMA, 142.]

CHATTEL MORTGAGE WITH RESERVATION OF POSSESSION AND POWER TO SELL — CONSTRUCTION. — A mortgage by an insolvent debtor of the goods and fixtures in his store, reserving the possession thereof until the maturity of the debt, with reserved power of sale of the goods in the usual course of business, but with no reserved power of sale of the fixtures, is void, at the instance of his creditors as to the goods, but valid as to the fixtures, in favor of the mortgagee, who has no knowledge or notice of the mortgagor's insolvency.

CHATTEL MORTGAGE WITH RESERVATION OF POSSESSION — EVIDENCE OF FRAUD IN MORTGAGE. — A chattel mortgage reserving the use of the goods to the mortgagor until the maturity of the debt does not necessarily raise an implication of bad faith in the mortgagee, or establish actual evil intent in him. To impute bad faith to him, whether by construction merely or as a fact, it must appear, in addition to the benefit reserved on the face of the instrument, that he was charged with inquiry into the purposes of the mortgage by a knowledge of the mortgagor's insolvency, or at least of the fact that he was indebted.

Watts and Son, for the appellant.

Semple and Gunter, and *C. P. De Yampert*, for the appellee.

McCLELLAN, J. J. B. Williams, being engaged in the retail drug business in the city of Montgomery, and indebted to the appellant, executed to her a mortgage covering his stock in trade and the furniture and fixtures in his store. As to the stock, the mortgage contains stipulations for the mortgagor's continued possession, and power of disposition in the usual course of business. As to the fixtures, the possession is retained till the maturity of the secured debt, but no power of sale is reserved. The mortgagor, at the time of the transaction, owed other debts, but it does not appear that the mortgagee knew this; he was insolvent, but it is admitted that the mortgagee did not know it. The mortgage is confessedly void on its face as to the stock of goods. It is valid as to the fixtures, dissociated from the stipulations as to the goods. The sole question presented by this record is, whether the fact that the mortgage is constructively fraudulent on its face with respect to the goods avoids it *in toto*.

The authorities on the point are numerous, and in irreconcilable conflict. The courts of last resort in three or four states have held, without qualification, that the infirmity as to one item of property infects and vitiates the entire grant: *Hyslop v. Clarke*, 14 Johns. 464; *Russell v. Winne*, 37 N. Y. 591; 97 Am. Dec. 755; *Burke v. Murphy*, 27 Miss. 167; *Som-*

merville v. Horton, 4 Yerg. 541; 26 Am. Dec. 242; *Claffin v. Foley*, 22 W. Va. 434; and many other cases in the states indicated. On the other hand, it has been ruled by the courts of final jurisdiction in several other states, by intermediate federal courts, and by the supreme court of the United States, that such a conveyance, in the absence, as is the case here, of the infection of actual fraud, is bad to the extent only of the property out of which a benefit is reserved to, or a trust created to the use of, the grantor, and good as to that part of its subject-matter with respect to which no benefit is reserved and not trust is created: *State v. Tasker*, 31 Mo. 445; *State v. D'Oench*, 31 Mo. 453; *Donnell v. Byern*, 69 Mo. 468; *Garland v. Rives*, 4 Rand. 283, 309; *Henderson v. Hunton*, 26 Gratt. 926; *Barnett v. Fergus*, 51 Ill. 352; *In re Kahley*, 2 Biss. 383; *In re Kirkbridge*, 5 Dill. 116; *United States v. Bradley*, 10 Pet. 343. No attempt will be made to harmonize these variant adjudications. It may be well to remark, however, that the conclusion reached in not a few of the cases referred to first above might have been put upon and justified by the existence of actual fraud in the transaction, but the opinions do not proceed upon that theory. This is notably true of the West Virginia and Mississippi cases; and the distinction taken, in the cases last cited, between the effect of fraud in fact and fraud in law, upon conveyances of the class under consideration, appears to have been recognized, at least in equity, by Chancellor Kent in some of the earlier New York cases: *Sands v. Codwise*, 4 Johns. 536, 546; 4 Am. Dec. 805; *Boyd v. Dunlap*, 1 Johns. Ch. 478; and to have been so understood by Justice Story in *Bean v. Smith*.

Mr. Jones, in his work on chattel mortgages, thus presents these divergent doctrines: "In New York, and one or two other states, a mortgage which is void by reason of containing provisions allowing the mortgagor to sell merchandise covered by it, in the usual course of trade, is void as to every other kind of property embraced in it. . . . The fraudulent and unlawful intent of the parties cannot be confined to a part of the property, but vitiates the entire instrument, although it may include lands or other property as to which it would be valid if it could be regarded as a mortgage of that only, and in relation to which there was a *bona fide* intent to convey it as a security for an honest debt. But," proceeding now to state the doctrine which prevails elsewhere, "a mortgage not actually fraudulent may be valid in part and void

in part. Such is the case when the mortgage secures a debt which is in part valid, and in part void for usury. And so a mortgage obtained under inequitable or suspicious circumstances, but not with a fraudulent intent, may be set aside in part, and allowed to stand as a security for what is due. Although a mortgage be inoperative as to a part of the property described, because it has not been acquired, it is not for that reason invalid in respect to other property which the mortgagor owned at the time of executing the mortgage. A mortgage covering a stock of goods and fixtures, although void as to the stock, by reason of the mortgagor's right to continue in possession and sell them, is held binding upon the fixtures, as to which the power of sale did not apply": Jones on Chattel Mortgages, secs. 350, 351.

Mr. Bump fully recognizes the doctrine which obtains in equity, that while a transaction tainted with actual fraud is absolutely void, and will not be permitted to stand for the purposes of indemnity or reimbursement, yet, where the transfer is fraudulent in law only, it will be allowed to operate as a security to the grantee for money advanced by him to pay off encumbrances, or to pay the mortgagor's debts, and the like: Bump on Fraudulent Conveyances, 613, 616. And this distinction is admitted, even with respect to conveyances of the kind under consideration, at least to a limited extent, with respect to which the author, after laying down the general proposition, that "if a mortgage is made with intent to secure a part of the property to the mortgagee, and to cover the residue for the use of the debtor, it is void as to the whole. To render an instrument valid, it must be given in good faith, and without any intent to hinder or delay creditors. This cannot be true when the object, as to a part of the property, is to defraud creditors," etc., continues: "When fraud, however, is imputed from the mere omission to deliver the possession of the property to the grantee, the transfer will be good as to the articles which are delivered, although it may be void as to the residue": Bump on Fraudulent Conveyances, 486, 487.

The decisions of this court on the matter in hand are not such as to stand between us and the adoption of either of the views above set forth. Aside from *dicta*, there are but two cases which bear upon the point, and the tendencies of these are in opposite directions, if we are to construe them by the language of the opinions, and without reference to the partic-

ular facts of the cases. One is the case of *Tickner v. Wiswall*, 9 Ala. 305, 311, in which Judge Goldthwaite uses this language: "It is urged, however, if the conveyance is inoperative for this reason [reservation of power to sell] as to the personal estate, it should notwithstanding be sustained as to the real estate," as to which no such power was reserved. "The rule in this respect is, that a deed for being colorable and fraudulent as to part is void as to the whole of the property conveyed by it. If it was otherwise, the statute would be but a sorry attempt at prevention, and the fraudulent debtor, in many cases, would attain his object." The considerations which prevent this case being a direct authority for the proposition announced in the quotation made are, that it very clearly appeared in the evidence that the deed was tainted with an actual fraudulent purpose, participated in by both parties. The expression "for this reason," in that part of the opinion set out, and which is all that is said on the point in hand, has reference to what immediately precedes. Recurring to that, we find the following: "It is only necessary to ascertain if the admissions of the answers make out to a reasonable certainty that Tickner (the grantor) was in failing circumstances, or rather, on the eve of notorious insolvency. This, we think, abundantly appears from the whole case. . . . This matter is charged as a badge of fraud, and is not denied by Day (the grantee), nor does he assert his ignorance of the fact. We must, then, conclude that the mortgage was taken with a full knowledge of all the attending circumstances; and there being no evidence or even allegation to the contrary, we consider it as exhibiting the intention to provide a means for Tickner to carry on his business unmolested by other creditors." It appears, therefore, that while no reference is made to the distinction between actual and constructive fraud as a part of the declaration that the instrument was void *in toto*, yet, not only might the conclusion reached have been justified on the ground that the transaction was infected with actual fraud, but the reference to that part of the opinion which affirms the existence of actual fraud in both parties strongly inclines the mind to the inference that the learned judge predicated his announcement on the existence of fraud in fact as distinguished from fraud in law. At least, it cannot be fairly said that *Tickner v. Wiswall*, 9 Ala. 305, is a positive and binding authority against the validity of the mortgage involved in the case at bar.

The other case to which reference has been made is that of *Anderson v. Hooks*, 9 Ala. 704, in the same volume, it may be noted, as that considered above, and decided by the same judges. There it was held unequivocally that a deed untainted by actual fraud may be void in part and good in part, not only at the common law, but by statute also. In view of the identity of the *personnel* of the court, and the fact that both cases were decided at the same term, *Anderson v. Hooks*, 9 Ala. 704, which recognizes and enforces the distinction between actual and constructive fraud on a question similar to that under consideration, may well be taken *arguendo* in support of a construction of *Tickner v. Wiswall*, 9 Ala. 305, which would confine its effect as authority to cases involving actual fraud on the part of the grantee. Nevertheless, *Anderson v. Hooks*, 9 Ala. 704, is not a binding authority for the validity of the mortgage here as to the fixtures, any more than *Tickner v. Wiswall*, 9 Ala. 305, is a binding authority for its avoidance *in toto*. The cases are not alike in their facts. Here two items of property are involved, and one grantee; there it was one item of property, and two grantees. Here the mortgage is bad because of an infirmity affecting only one piece of property, unless by relation; there the mortgage was bad because of an infirmity affecting only one grantee, unless by relation. It was there held that, unless the other grantee actually, and not by mere intendment of law, participated in the fraudulent intent of the one whose debt was simulated, the instrument would be avoided as to the latter, and sustained as to the former; that it was void in part and good in part. There are authorities which, while holding to this doctrine, yet repudiate its application to a mortgage containing a constructively fraudulent stipulation as to a part of its subject-matter: See Bump on Fraudulent Conveyances, 487, 488. And though it may be doubted whether the discrimination is a sound one, we shall concede it to be, and treat *Anderson v. Hooks*, 9 Ala. 704, as well as *Tickner v. Wiswall*, 9 Ala. 305, as not being decisive of the point now under review.

There are other cases in Alabama which apply the equitable doctrine before adverted to, for the reimbursement or indemnity of a constructively fraudulent grantee, and deny such relief to grantees who have committed or participated in actual fraud; but manifestly those cases proceed upon principles which cannot obtain in a court of law, and could in no

court be applied to the facts of this case: *Potter v. Gracie*, 58 Ala. 303; 29 Am. Rep. 748; *Gordon v. Tweedy*, 71 Ala. 202.

We are left, therefore, to choose between the two doctrines on principle, and unfettered by adjudications to constrain us toward either. The case we have involves no evil intent on the part of the grantee, either as a fact proved or as a fact imputed. The law is, rather, that a conveyance reserving a benefit is void as to creditors, irrespective of the intent of the parties, or either of them, than that the fact of a reservation raises an imputation of evil intent in both. The statute, as well as the common law, seizes upon the fact of reservation or declaration of trust as a basis for avoidance, wholly without regard to the grantor's real purpose, and without regard to the grantee's knowledge, actual or constructive, of that purpose or participation in it. Hence it is, we think, safe to affirm that the mere fact of a reservation, standing alone, raises no presumption of bad intent in a grantee. There must be the concurrence of other circumstances. A grant by a person not indebted to others, and who does not subsequently become indebted to others than the grantee, is, of course, valid to all intents and purposes, notwithstanding it is made exclusively to the use of the grantor. So a grant the natural effect of which would be to hinder and delay creditors is entirely valid, there being no creditors. It follows that a grant to the use of the grantor, or reserving a benefit to him, does not necessarily raise an implication of bad faith in the accepting grantee, much less go to establish actual evil intent in him. To impute or show bad faith in the grantee, whether by construction merely or as a fact, it must appear, in addition to the trust created, or benefit reserved on the face of the instrument, that the grantee was charged with inquiry into the purposes of the grant, by a knowledge of the grantor's insolvency, or at least of the fact that he was indebted. Nothing short of this will suffice to impute to the grantee even that kind of bad intent which rests on legal presumptions.

On these principles, Mrs. Hayes, the appellant, cannot be charged with any evil purpose whatever, either actual or constructive. She is not shown to have known of other debts. She is affirmatively shown not to have known of the mortgagor's insolvency. What is there, therefore, in her mind, as a fact or by imputation, to make her a *particeps criminis* with Williams? What is the evil thing on her part to taint, like the trail of the serpent, this transaction? How can she

be holden to a covinous intent and to its all-pervading and vitiating consequences, when there is not only no direct evidence of its existence, but also no evidence of any fact or circumstance from which the law would presume its existence? She cannot, in our opinion, be so holden. All the cases and all the texts, whether they adhere to the one or the other of the doctrines we have stated, proceed on the theory that a conveyance of this sort is bad throughout, because it is tainted, it is infected, by a mental condition of the grantee which imports an element of criminality in the transaction. To criminality, actual evil intent is essential. To "taint" and to "infect," as those words are employed, involve, of necessity, the idea of that which is abstractly bad, and in point of fact offensive to the moral sense. The cardinal difference between those cases which hold conveyances which are void as to a part of the property void as to the whole under all circumstances, and those which require to this result the existence of actual fraud, is, that the former presume an evil purpose, a criminal design in the grantee, from the mere fact of accepting a deed containing a reservation, while the latter require some evidence of its existence as a matter of fact before visiting punishment upon the grantee for entertaining it.

We cannot find justification for the position first stated. Support is sought for it in the maxim which holds that all men have intended the probable consequences of their acts. This is begging the question. It is an unwarranted assumption that the act is itself evil, which it is not, in the absence of notice of indebtedness or insolvency on the part of the grantor. It assumes, also, that the probable consequence of accepting such a conveyance is, that creditors will thereby be hindered, delayed, and defrauded, when in truth and in fact that result would not only not be a probable consequence of accepting the conveyance from a solvent man who owed no debts, but would be an impossible consequence. And surely the law cannot, and does not, indulge the presumption that every man who conveys to his own use, or reserves a benefit out of the thing conveyed, is insolvent, or even indebted. The presumption of an evil intent, therefore, in a grantee who accepts a conveyance of property in which a benefit is reserved cannot be indulged, in the absence of some further fact than the reservation itself. Without such evil intent, the whole conveyance cannot be said to be tainted and infected;

the grantee cannot be put in the category of a *particeps criminis* with the grantor, of whose bad purposes he was not advised or even put on inquiry. The law, taking hold of the fact of the reservation in such cases, and not concerning itself with the intent, will annul it as to the property to which it pertains, when the rights of creditors are involved; but if the conveyance embraces other property which is not reserved to the grantor, but goes to the satisfaction or security of the grantee's debt, that is no constructive fraud upon other creditors; they have nothing to complain of with respect to that property, since its disposition does not hinder, delay, or defeat them in any legal or just sense, unless that disposition was in consonance and in the effectuation of an actual or necessarily imputed evil intent which taints the whole transaction with actual fraud: See *McGuire v. Shelby*, 20 Ala. 456; *Western Ass'n Co. v. Stoddard*, 88 Ala. 607.

The position of counsel, that, whatever may be the true doctrine at common-law, under our statute a conveyance bad as to a part of its subject-matter must be avoided *in toto*, is untenable. *Anderson v. Hooks*, 9 Ala. 704, is directly in point against this contention. So, also, are the cases of *State v. Tasker*, 81 Mo. 445, *State v. D'Oench*, 81 Mo. 453, *Donnell v. Byern*, 69 Mo. 468, and *In re Kirkbridge*, 5 Dill. 116, which construe a statute of Missouri, almost identical in its terms with section 1730 of the code, to avoid, not the instrument by which property is conveyed to the grantor's use, but the alienation of that particular property as evidenced by the paper, the writing being allowed to stand as a muniment of title to any other property embraced in it. In *Anderson v. Hooks*, 9 Ala. 704, the same doctrine is elaborately set forth. It is there held that our former statute (Clay's Digest, 254), from which sections 1730 et seq. of the present code have been evolved by successive codifications, without any material change in the meaning of the original act, at least so far as the point under consideration is concerned, was directed against the particular alienation, or attempted alienation, and not against the whole instrument containing a conveyance of property which was constructively fraudulent; and that one grant evidenced by a deed or mortgage might be bad and another might be good. The rule we apprehend to be that announced by Lord Chief Justice Gibbs, and quoted in that case, that "there is no difference between a transaction void at common-law and void by statute. If an act be pro-

hibited, the construction to be put on a deed conveying property illegally is, that the clause which so conveys is void, equally whether it be by statute or common law. But it may happen that the statute goes further, and says that the whole deed shall be void to all intents and purposes; and when that is so, the court must so pronounce, because the legislature has so enacted, not because the transaction is illegal. I cannot find in this act any words which make the entire deed void. . . . I think this grant of that interest in land which, by the terms of the grant, is to be applied to a charitable use, is void; and that the deed, so far as it passes other lands, not to a charitable use, is good." To same effect are the cases of *Bates v. Bank*, 2 Ala. 485, and *United States v. Bradley*, 10 Pet. 343. We accordingly hold that, on the agreed facts in this record, the title to the fixtures was in Mrs. Hayes, and the circuit court erred in giving the affirmative charge against her.

Reversed and remanded. —

CHATTEL MORTGAGE — POSSESSION AND POWER TO SELL RESERVED IN THE MORTGAGOR. — As to the effect of a chattel mortgage allowing the mortgagor to retain possession and sell the mortgaged property, see *Peabody v. Landon*, 61 Vt. 318; 15 Am. St. Rep. 903, and extended note 912-917. Compare *Hoge v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422, and note.

WALDMAN v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[91 ALABAMA, 170.]

AGENCY — NOTICE TO AGENT AS NOTICE TO PRINCIPAL. — A clerk employed by an insurance agent without the knowledge of the company, and authorized by such agent to fill out and issue policies, sign the agent's name, and to indorse the rate of insurance on policies, is not the agent of the company so as to charge it with notice of facts of which he has notice.

INSURANCE — WAIVER OF FORFEITURE BY CLERK OF AGENT. — An insurance agent who has power to waive the forfeiture of a policy for additional insurance effected without the consent of the company cannot delegate such authority to his clerk, employed by him to discharge clerical work, and without the knowledge or consent of the company; nor will a waiver of such forfeiture by the clerk be imputed to the company.

Watts and Son for the appellant.

Tompkins and Troy, for the appellee.

McCLELLAN, J. This action is upon a policy of fire insurance. The following is one of its stipulations: "Or if the assured shall have, or shall hereafter make, any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of the company written hereon, . . . then, and in every such case, this policy shall become void." The assured subsequently did make such other contract of insurance. No consent thereto was ever written on the policy. In point of fact, no notice thereof was ever brought home to the insurer, or to E. B. Joseph, its local agent, until after the loss for which recovery is now sought. None of these facts are controverted. One Gay was a clerk of the Capital City Insurance Company. Said Joseph was president of that company. He conducted the business of the defendant company in the office of the company of which he was president. Gay acted, in some sort, in the capacity of clerk to him, in respect to the business of the agency. It is claimed by the plaintiff that Gay had notice of the additional insurance, and waived the forfeiture operated thereby; but the evidence on the point is in direct conflict. Conceding, however, that he did, the question is, whether notice to him was notice to the company, and whether a waiver by him would bind the company. This depends, of course, upon the facts as to his relations with the company, and with Joseph, its agent. Confessedly he was not the agent of the company. It had not employed him. It had not authorized him to act for it. It did not know him, or that he had ever assumed, or been employed by Joseph, to act for it. He was, however, in some manner, as we have seen, the clerk of Joseph in his business. In that capacity, he was to do mere clerical work. "He was to do what I told him to do," Joseph swears. He had authority from Joseph to fill out insurance policies, and he sometimes issued policies, signing Joseph's name thereto with a stamp. He also had authority from Joseph, it seems, to raise the rate of insurance in policies, and to indorse the fact upon them. He did so, it appears, in this instance. But the defendant company never knew about any of these things. Joseph swears further that he had never authorized Gay to waive any of the conditions embodied in the policies of the defendant corporation. These are all the facts found in the record as to the capacity in which Gay acted, and his authority in the premises. There was no controversy as to any of them.

Upon this showing, our opinion is, that Gay was in no sense the agent of the defendant, nor authorized to bind it in any degree; nor was it affected by the alleged notice to him of the additional insurance. The principle of law involved we find nowhere better stated than in Mechem on Agency, sec. 197, as follows: "If an agent employs a subagent for his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal. . . . But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent, therefore, is the agent of the agent only, and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or his agent"; and at section 728, where it is said: "The question whether notice to a subagent is notice to the principal depends upon considerations already stated [referring to section 197, quoted above]. If the subagent be one whom the agent was expressly or impliedly authorized to appoint, he is deemed to be the agent of the principal, and notice to such subagent would be notice to the principal, as in the case of other agents. But if the subagent be the agent of the agent merely, then there is no privity between him and the principal, and his knowledge cannot be imputed to the principal."

If it be conceded that Joseph, so far as in him lay, authorized and empowered Gay to waive the forfeiture operated by the additional insurance (though the evidence is without conflict to the contrary), and Gay attempted, by affirmative act or expressed consent (instead of the mere indorsement which he made on the policy raising the rate, after his alleged notice of additional insurance), to waive the forfeiture, yet his act or consent to that end would be entirely nugatory, so far as the right of the company to insist on the forfeiture is concerned. Joseph's agency must be considered in the light of a personal trust, at least in respect to all matters embraced in it which involved the exercise of judgment and discretion, and especially with respect to so important a matter as the waiver of forfeitures stipulated for in the contract,—a trust which he could not delegate to another, of whose capacity and integrity the principal may not have been ad-

vised, or which, had it been advised, would not have induced his employment: 1 Wait's Actions and Defenses, 215; *Johnson v. Cunningham*, 1 Ala. 258; *Mound City etc. Ins. Co. v. Huth*, 49 Ala. 538; *Litus v. Cairo etc. R. R. Co.*, 46 N. J. L. 393; 1 Am. & Eng. Ency. of Law, 368.

But in point of uncontroverted fact, as we have seen, Gay had no authority, even from Joseph, to waive the forfeiture now relied on by the defendant. At the most, he was Joseph's agent to do certain things, clerical in their nature, or at least not including the act here involved. Joseph not only could not have authorized him to act in this matter, or put him forward as the representative of the company, for the purposes of notice or otherwise, in respect to the waiver now claimed, but he did not assume or undertake to do so. The case, in any aspect, is within the decision of the New Hampshire court, that "a person employed by an authorized agent of an insurance company to solicit application for insurance, receive premiums, and deliver policies, has no authority, by reason of such employment, to consent to additional insurance in other companies; and notice to him of such additional insurance is not notice to the company": *Heath v. Springfield F. Ins. Co.*, 58 N. H. 414; also *Tute v. Citizens' Mut. F. Ins. Co.*, 18 Gray, 79; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51.

There are, it is true, cases in which the agent of the agent will become the agent of the original principal by implication of law, resulting from the subagent's having acted for so long for the principal, and so held himself out or been held out by the agent as having authority to represent the principal, as that knowledge of his acts will be imputed to the company, it be held to a ratification of them, and estopped to deny responsibility therefor. Such was the case of *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566. But the evidence here falls very far short of the facts upon which the implication of agency was based in that, or any other case of which we are advised. There is absolutely nothing in the facts of this case to raise up an imputation that the defendant corporation knew of Gay's alleged acts in representation of it, or ratified them, or did or omitted to do anything in respect to them, which will now operate an estoppel to deny responsibility for them.

Our conclusion is, therefore, that on the undisputed facts in the case, the policy was forfeited by the additional insur-

ance; that the company not only did not consent thereto, as provided for in the instrument, but had no notice thereof until after the loss, and hence could not have waived, and did not in point of fact waive, the forfeiture. On the case as thus presented, the defendant was entitled to the general affirmative charge in the court below; and the judgment will not be disturbed for errors of law committed on the trial, since in no event could the plaintiff have been entitled to recover: 8 Brickell's Digest, p. 405, sec. 22; *Foster v. Johnson*, 70 Ala. 249; *Harrison v. Palmer*, 76 Ala. 157; *Baker v. Bardiff*, 76 Ala. 414; *Tuskaloosa etc. Oil Co. v. Perry*, 85 Ala. 158; *Alabama Sipsy River Nav. Co. v. Georgia Pac. R'y Co.*, 87 Ala. 154; *Stephens v. Regenstein*, 89 Ala. 581; 18 Am. St. Rep. 156.

The judgment of the circuit court is affirmed.

A CONTRARY DOCTRINE TO THAT OF THE PRINCIPAL CASE seems to have been laid down in *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, where it was held that a clerk employed by an insurance agent might make any waiver which the agent himself was authorized to make in the discharge of the business of his agency.

INSURANCE — AGENT — CLERK. — An ordinary insurance agent may employ a clerk to transact the business of his agency, and, within the line of his employment, the acts of such clerk will be regarded as the acts of the agent, and bind the company: *Arff v. Star F. Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721; *Deltz v. Providence etc. Ins. Co.*, 33 W. Va. 526; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 178. Compare *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178.

SNIDER SONS' COMPANY v. TROY.

[91 ALABAMA. 224.]

CORPORATION DE FACTO EXISTS when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law, or in other words, when there is an organization with color of law and an exercise of corporate rights and franchises.

CORPORATIONS DE FACTO — ESTOPPEL BY CONTRACT WITH — LIABILITY OF STOCKHOLDERS AS PARTNERS. — A creditor who has contracted with a *de facto* corporation in its corporate capacity, and within the scope of its assumed powers, is estopped to deny its corporate existence and character, and cannot charge its stockholders, as partners, with a corporate debt, in the absence of fraud.

APPEAL from a judgment overruling a demurrer to a plea.

E. P. Morrisett, for the appellants.

Tompkins and Troy, for the appellee.

CLOPTON, J. A corporation *de facto* exists when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises: *Methodist etc. Church v. Pickett*, 19 N. Y. 482.

The enabling law under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803–1812 of the code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law: Acts 1882–83, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with the judge of probate of Montgomery County a written declaration, signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons; that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, transacting business, and exercising franchises, functions, and powers, after an attempted incorporation, as if it were a corporation *de jure*, — a colorable compliance with the requirements of an existing and enabling law, and user of the rights claimed to be conferred thereby, — the essential elements of a corporation *de facto*: *Central Agricultural etc. Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold

to the Dispatch Publishing Company. Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In Cook on Stocks and Stockholders, sec. 283, the doctrine asserted is: "A corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Omaha Smelt. Co.*, 4 Neb. 416; *Garnett v. Richardson*, 35 Ark. 144; *Ferris v. Thaw*, 72 Mo. 446; *Ridenour v. Mayo*, 40 Ohio St. 9; *Coleman v. Coleman*, 78 Ind. 844. We have omitted reference to a few cases sometimes cited, for the reason that either the question of liability as partners was not before the court, as in *Blanchard v. Kaul*, 44 Cal. 440; or the debt was contracted before any steps were taken, other than the mere filing of a certificate, toward organization, as in *Porpoise Fish Co. v. Bergen*, 13 Am. & Eng. Corp. Cas. 1; or it was contracted after the expiration of the charter by its own limitation, without reorganization, as in *National Union Bank v. Landon*, 45 N. Y. 410. In the last case cited, the shareholders entered into a special agreement, which, by its terms, created a partnership as to third persons.

In 2 Morawetz on Private Corporations, sec. 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as parties to the contract, either severally or jointly, or as partners." The following cases maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts: *Fay v. Noble*, 7 Cush. 188; *First Nat. Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. L. 599; *Planters' etc. Bank v. Padgett*, 69 Ga. 164; *Merchants' etc. Bank v. Stone*, 38 Mich. 779; *Humphreys v. Mooney*, 5 Col. 282; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Whiting v. Wyman*, 101 U. S. 392.

The plea and demurrer do not raise the question of the liability of the supposed stockholders as partners, where there has been no intention or attempt to incorporate; where they

are acting as a body corporate, without even color of legislative authority,—sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a *de facto* corporation, and that plaintiff sold the goods to and contracted with the company as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is, whether, there being no fraud alleged, nor statute making the stockholders individually liable, a creditor who has dealt with a *de facto* corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the existence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually. The conflicting authorities afford aid in the solution of this question only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion.

Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in *Lehman v. Warner*, 61 Ala. 455, in the following language: "The corporation must, of necessity, be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state — the sovereign — whose rights are invaded, and whose rights are usurped. The individual could not create the corporation, — could not grant, define, limit its powers; and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether the corporate existence is rightful — *de jure* — or merely colorable": Taylor on Private Corpo-

rations, sec. 145; 4 Am. & Eng. Ency. of Law, 198. The creditor cannot proceed against the stockholders as partners without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality of its existence.

It is also an established rule, of general application, that a party who contracts with a corporation exercising corporate powers and performing corporate functions—existing as a *de facto* corporation—in its corporate name and capacity will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence: 4 Am. & Eng. Ency. of Law, 198. In *Smartwout v. Michigan Air Line R. R. Co.*, 24 Mich. 390, Cooley, J., declares the rule as follows: “Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised.”

The general rule is thus stated by Brickell, C. J.: “Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought”: *Cahall v. Citizens' M. B. Ass'n*, 61 Ala. 232; *Central Agricultural etc. Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411; 18 Am. St. Rep. 51.

It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation, or persons who have contracted with it, where the stockholder, corporation, or person is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should a stockholder be estopped, in a suit by a creditor of an insolvent corporation, to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation, and

proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on corporations (sec. 148), having stated the general rule that a corporation when sued on its contract, and the person who contracted with it when sued on his contract, is each estopped to deny its legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its share-holders liable as partners." And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a *de facto* corporation, charging the stockholders as partners.

Another consideration: Section 8 of article 14 of the constitution declares: "In no case shall any stockholder be individually liable, otherwise than for the unpaid stock owned by him or her." Exemption from liability, other than for unpaid stock, is the declared policy of the state. It cannot be imposed by legislation, or by the judgment of a court. In view of the constitutional provision, it is manifest that the share-holders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an enterprise or adventure is not determinable by the name they assume, but by the legal consequences of their acts. A partnership may arise as to third persons, by mere operation of law, and contrary to the intention of the parties; but to have this effect, the elements essential to constitute a partnership as to third persons must exist. A corporation *de facto* has an independent *status*, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in *Fay v. Noble*, 7 Cush. 188: "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners,—a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract, changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract, and effects the imposition of an enlarged liability, which they did not assume, but intended to avoid,—so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle that the corporation and the share-holder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party—the corporation—with which he made the contract, and seeks its enforcement against parties who never entered into contractual relations with him.

The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning, consistent with well-settled principles, and in harmony with the policy of the state.

Affirmed.

CORPORATION DE FACTO, WHEN EXISTS. — For a definition of a *de facto* corporation, and a discussion of what circumstances give rise to such an organization, see note to *Hildreth v. McIntire*, 19 Am. Dec. 67, 68.

CORPORATIONS, ESTOPPEL TO CONTEST THE VALIDITY OF THE FORMATION OF. — Persons who have been instrumental in the formation of a corporation, or who have contracted with the corporation with full knowledge of all its transactions, are not allowed to contest the regularity of its formation: *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and note; *Bailey v. Champlain etc. Co.*, 77 Wis. 453; *National Commercial Bank v. McDonnell*, 92 Ala. 337. See also note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 827, 872.

SEMPLE v. GLENN.

[91 ALABAMA, 245.]

CORPORATIONS — SUBSCRIPTIONS TO STOCK — JURISDICTION OF EQUITY TO MAKE CALLS. — If the directors of a corporation neglect or refuse to call in unpaid subscriptions to stock necessary to pay the claims of creditors, equity will take jurisdiction, and make the requisite calls.

CORPORATIONS — CALLS FOR UNPAID STOCK SUBSCRIPTIONS — STATUTE OF LIMITATIONS. — When, by the terms of subscription to the stock of a corporation, payments are to be made in installments as may be called for by the corporation, the statute of limitations does not begin to run in favor of the subscriber until a call is made by the corporation or by a court of competent jurisdiction, although the corporation has abandoned its charter, ceased to do business, and has assigned all its property, including unpaid stock subscriptions, for the benefit of creditors, so that calls cannot be made in the mode prescribed by the contract of subscription.

PRACTICE — AMENDMENT OF COMPLAINT. — A complaint cannot be amended by adding the common counts, when it appears affirmatively that they present a new and separate cause of action from that stated in the original complaint.

JUDGMENTS RENDERED IN ANOTHER STATE. — A decree of a court of competent jurisdiction in another state, taken *pro confesso*, in a suit against a corporation, establishing the fact that service of process on two of the directors and the cashier was a sufficient service of process on the corporation, is conclusive in the courts of a sister state, when such decree is offered in evidence, although it may abound in errors and irregularities; but it cannot establish the legal identity of two corporations, when that question was not at issue in that suit.

CORPORATIONS — MINUTES OF, AS EVIDENCE. — The minutes of the meetings of a corporation, if identified or shown to be correct or authoritatively made, are *prima facie* evidence of the preliminary proceedings for its incorporation, and are admissible against a stockholder, in an action to recover his unpaid stock subscription, to show that in the subsequent incorporation of a second company to succeed the first there was no material change or departure from the original character and purposes of the first corporation.

CORPORATIONS — BOOKS OF, AS EVIDENCE OF SUBSCRIPTION TO STOCK. — When the name of a party appears on the books of a corporation as a stockholder, the presumption is, that he is the owner of stock; and in a suit against him as such stockholder, the burden of proof is on him to rebut the presumption, and to show that his name was placed there without his authority, express or implied, and that he had no notice that his name thus appeared.

CORPORATIONS — UNPAID STOCK SUBSCRIPTION — PRESCRIPTIVE PRESUMPTION OF PAYMENT. — When a stockholder in a corporation is sued to recover his unpaid subscription, the defense of prescriptive presumption of payment is sustained by proof that more than twenty years have elapsed without any call upon him for payment, and without any recognition by him of liability on his part.

CORPORATION — ASSIGNMENT BY — PRESUMPTION OF PAYMENT OF STOCK SUBSCRIPTION. — When an insolvent corporation makes an assignment

to trustees, they may at once call in unpaid stock subscriptions, or institute suit for that purpose, and on their default the creditors may thus call them in; but the holders of unpaid stock are not responsible for the default of the trustees or of the creditors, and may rely upon the defense of prescriptive presumption of payment, when sued for unpaid subscriptions after a great lapse of time.

CORPORATIONS — CONCLUSIVENESS OF JUDGMENT AGAINST, AS TO UNPAID STOCK SUBSCRIPTIONS. — A judgment against an insolvent corporation foreclosing a deed of assignment made by it is conclusive on the stockholders as to all corporate matters, and property rights and interests in the corporation. It cannot, however, operate to conclusively fix the personal liability to the corporation of the stockholders not made parties for unpaid stock subscriptions. When such stockholders are subsequently sued by the trustee appointed under the decree to recover the amount of their unpaid stock subscriptions, they may, notwithstanding the decree, show that they are not stockholders, though their names appear on the books of the corporation, or that they have paid their subscriptions in full, or that presumption of payment arises from lapse of time.

ACTION by John Glenn as trustee under appointment by the chancery court of Richmond, Virginia, against H. C. Semple as a stockholder in the National Express and Transportation Company, a corporation chartered in Virginia in December, 1865. The suit was commenced November 19, 1886, to enforce the payment of subscription to stock of the corporation, made by defendant, and assessed and called for by the decree of said chancery court rendered March 26, 1886. Judgment for plaintiff, and defendant appealed.

Troy, Tompkins, and London, for the appellant.

William S. Thorington, for the appellee.

CLOPTON, J. In *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, two propositions were declared: 1. When the directors of a private corporation, having authority, neglect or refuse to call in unpaid subscriptions for stock, necessary to pay the claims of creditors, a court of equity will take jurisdiction and make the requisite calls; 2. If by the terms of subscription the payments are to be made in installments as may be called by the company, the statute of limitations does not begin to run in favor of the subscriber until a call is made by the company or by a court of competent jurisdiction. We are urged, on the application for a new rehearing, to consider the question as to the time when the statute of limitations begins to run. It may be that the ends of justice and the wise policy of the statute would have been more effectually subserved had the rule been adhered to in these cases, that when a corporation abandons its charter, ceases to do business, and

assigns all its effects, including the unpaid subscriptions for stock, to trustees for the benefit of creditors, so that calls cannot be made in the mode prescribed by the contract of subscription, the debt for the unpaid stock is regarded, as between the trustees or creditors and the subscribers, as payable on demand without a formal call, and that such demand must be made in a reasonable time. This is the rule recognized in *Curry v. Woodward*, 53 Ala. 371; in *Hatch v. Dana*, 101 U. S. 205; in *Glenn v. Dorsheimier*, 23 Fed. Rep. 695; 24 Fed. Rep. 536; and in *Glenn v. Priest*, 28 Fed. Rep. 907. But however this may be, the question as to the time when the statute of limitations commences to run has been subsequently decided by this court in *Lehman v. Glenn*, 87 Ala. 618, and other cases in the same volume; also by the courts of several of the states and the supreme court of the United States, in suits by the same plaintiff, against stockholders of the same corporation, on the same call. There has been a consensus of opinion maintaining the rule as declared in *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, and it should be regarded as settled, especially as between the parties to this suit. It would be unwise to disturb it now. We shall therefore confine the consideration to questions which did not arise or were not decided in the other cases.

A preliminary question arises on the allowance of an amendment to the complaint. The cause of action presented by each count of the original complaint is an express contract of subscription for ten shares of stock made with the National Express and Transportation Company under the name of the National Express Company. The amendment, which was made during the trial, introduces the common counts for money had and received, account stated, money paid, work and labor done, and goods and chattels sold; all of them, except the one for money had and received, being promises to plaintiff as trustee of the National Express and Transportation Company. Not only is there nothing in the record to authorize the presumption that the amendment was not intended to introduce new causes of action, but a comparison shows that the common counts represent separate and distinct causes of action from that presented in each count of the original complaint. That the circuit court so understood the amendment is manifest from the instruction to the jury, to the effect that if defendant subscribed to the new company, he would be liable, independently of his original sub-

scription,—that is, of his express subscription under the name of the National Express Company. On the authority of *Mahan v. Smitherman*, 71 Ala. 563, we must hold that the amendment was improperly allowed, though unwilling to extend that decision beyond the facts of the case, or substantially the same facts.

Appellee sues to recover a call of fifty per cent of the par value of ten shares of the capital stock of the National Express and Transportation Company, ordered March 26, 1886, by the chancery court of the city of Richmond, Virginia, on a creditors' bill, seeking the construction and enforcement of a deed of trust, by which the corporation assigned all its property, rights, and credits, including the unpaid subscriptions for stock, to three named persons, for the benefit of its creditors, and the marshaling and distribution of the corporate assets. The record and proceedings of the chancery court were admitted in evidence against the objection of defendant. The specific objection is, that the record fails to show service of process on the corporation, and a valid decree *pro confesso*; in other words, that the chancery court did not obtain jurisdiction of the corporation. The bill was filed in December, 1871, against the corporation, some of its officers, and the trustees. It does not appear that any subpoena was issued against the corporation until the day after an amended and supplemental bill was filed, August 4, 1879, when one was issued on the original, amended, and supplemental bill. It was served on a director and the cashier of the company, both of whom appeared and answered; but neither having answered in the name of or for the company, the bill was taken as confessed against the corporation. The question of the sufficiency and validity of the service of process was directly brought by the petition of the stockholders before the circuit court of Henrico County, to which the cause had been removed. By that court the service was adjudged to be valid, and that the corporation was before the court. The judgment of the circuit denying the prayer of the petitioners was affirmed by the court of appeals, which necessarily involved the validity of the service of process, though not passed on in terms: *Hamilton v. Glenn*, 85 Va. 901. It may be that the record and proceedings abound in errors and irregularities, but the decrees are not void, and we are bound to accord to them the same faith and credit they have by law and usage in the courts of Virginia.

Printed copies of the proceedings of the meetings of the subscribers to the stock of the National Express Company were also admitted in evidence, against the objection of defendant. It does not appear from the record that the identification or correctness of the copies, or that the minutes were made by any person authorized to make them, was shown. But as no objection on this ground seems to have been made in the trial court, nor made here, we must assume that this ground of objection was waived. The complaint avers that defendant subscribed for ten shares of the capital stock of the National Express and Transportation Company, under the name of the National Express Company; and plaintiff introduced in evidence a written subscription to the latter company, *eo nomine*, and claims that by virtue thereof defendant is a stockholder in the National Express and Transportation Company. It was therefore incumbent on plaintiff to show the legal identity of the two companies.

The statement in the opinion in *Lehman v. Glenn*, 87 Ala. 618, that the legal identity of the companies was one of the points conclusively determined by the Richmond chancery court, does not seem to be sustained by the record. An examination shows that the identity of the two companies was not within the issues in the suit, nor was it decreed. That court was dealing with the National Express and Transportation Company as an original corporation, and only from the time of its organization; the preliminary proceedings, looking to incorporation, were not involved. By reference to the proceedings, it appears that at a meeting of the citizens of Richmond, on September 18, 1865, it was proposed to organize a National Express Company, making the act of the legislature of Virginia, passed March 22, 1861, incorporating the Southern Express Company, the basis of the corporation; and as a larger capital would be necessary than that authorized by the act, and as other provisions, not contained therein, would be required, to apply to the legislature to grant the company a modified charter, adapted to its objects and the magnitude of its plans. On the nineteenth day of the same month, a committee was appointed to memorialize the general assembly for the passage of an act increasing the capital stock, changing the corporate name, and for such other modifications as may be deemed necessary. On October 12, 1865, certain gentlemen were appointed to visit several named cities, among them the city of Montgomery, to receive subscriptions to the

stock of the company. Defendant testified that he subscribed in the fall of 1865, which must have been after these meetings were held. The National Express and Transportation Company was organized January 16, 1866, under the act of March 2, 1861, amended so as to change the name of the corporation, increase the capital stock, and authorize the company to do an express and general transportation business.

It is contended that the term "National Express Company" does not import doing a general transportation business, and that the change of name, and the enlarged powers conferred, is a material departure from the character and purposes of the proposed corporation to which defendant subscribed; in consequence of which the subscription of defendant did not become a complete contract and binding obligation. The minutes of the meetings of the subscribers to the National Express Company, if identified or shown to be correct, or authoritatively made, are *prima facie* evidence of the preliminary proceedings for its incorporation, and are admissible for the purpose of showing that, in the incorporation of the National Express and Transportation Company, there is no material change or departure from the original character and purposes of the corporation intended to be formed.

The next objection is to the admission in evidence of the books of the corporation. It may be difficult, on principle, or well-recognized rules of evidence, to maintain the proposition that when the name of an individual appears on the books of a corporation as a stockholder, the presumption is that he is the owner of the stock, and casts on him, in a suit against him as a stockholder, the burden of rebutting the presumption, without showing that it was placed there by his authority, express or implied, or that he had any notice of his name appearing on the books; but the proposition is upheld by the great weight of authority, and should now be regarded as placed beyond the pale of discussion.

More than twenty years elapsed from the organization of the corporation, and from the execution of the deed of trust, before the commencement of this suit; and there is no evidence of the recognition of his liability on the part of defendant during this period, or anything to rebut the presumption of payment arising from the lapse of time, unless it be the call made by order of the court in December, 1880. Being doubtful whether this defense is sufficiently pleaded, we should probably decline its consideration, had it not been

stated in the former opinion in this case as the feature which distinguished it from the case of *Lehman v. Glenn*, 87 Ala. 618, and then ruled that the effect of the call of December, 1880, was to rebut the presumption of payment, which might otherwise have arisen by reason of the lapse of twenty years from the date of the subscription, without any action looking to the enforcement of the stockholder's liability.

This court has adhered with uniform tenacity to the doctrine of prescription, and has repeatedly held that the lapse of twenty years, without recognition of right or admission of liability, operates an absolute rule of repose: *McArthur v. Carrie*, 32 Ala. 88, 70 Am. Dec. 529, is the leading case in this state. A slave has been illegally sold by an administrator, and possession held by the purchaser more than twenty years. During that time there was no one who could have sued, and the plaintiff instituted suit immediately after being appointed administrator. There was no statute of limitations applicable. After observing that a *prima facie* presumption is raised whenever there is satisfactory proof of twenty years' uninterrupted adverse enjoyment and possession, Stone, J., says: "This *prima facie* case may, of course, be overturned. It cannot be done by proving that the title was, in its inception, defective. Proof, to be effectual for this purpose, should be addressed to the character of defendant's possession, either in its acquisition or use; must tend to show that such possession is not inconsistent with the plaintiff's right; or some other cause, independent of the original defect of title, must be given for the seeming long acquiescence." It was further said that in the absence of such excuse, the *prima facie* presumption becomes conclusive. The court has not only never departed from the principles thus declared, but repeatedly approved and affirmed them. Hence it has been held that a presumption of settlement, operating a positive bar to proceedings by a distributee to coerce a settlement, is created by the lapse of twenty years from the time a settlement of the administration and distribution of the assets could have been compelled in the probate court, without the administrator's recognition of the administration within that period, as a continuing, subsisting, and undischarged trust: *Harrison v. Heflin*, 54 Ala. 552; *Greenlee v. Greenlee*, 62 Ala. 330. Also, that twenty years' adverse possession of land will bar an infant's right of entry, though the entire period of adverse holding was during his infancy: *Woodstock Iron Co. v. Roberts*, 87 Ala. 436. Also,

if a mortgagee allows twenty years to elapse without taking any steps to compel the settlement of the mortgage, or to assert any rights of property under it, the presumption of payment or settlement arises: *Goodwyn v. Baldwin*, 59 Ala. 127. And though the statute of limitations has no application to express trusts — trusts exclusively of equitable cognizance — until there is an open disavowal brought home to the beneficiary, if twenty years are allowed to elapse from the time a settlement could have been coerced, without commencement of proceedings, or recognition of the trust, the presumption of settlement operates a bar: *McCarthy v. McCarthy*, 74 Ala. 546.

In *Philippe v. Philippe*, 115 U. S. 151, this was stated to be the settled doctrine in Alabama. Woods, J., says: "It is well settled by the decisions of the supreme court, that, even in the absence of a statute of limitations, if twenty years are allowed to elapse from the time at which proceedings could have been instituted for the settlement of a trust, without the commencement of such proceedings, and there has been no recognition or admission, within that period, of the trust as continuing undischarged, a presumption of settlement would arise, operating as a positive bar." This rule of repose "has been declared applicable to all kinds of debts and pecuniary obligations, including judgments, bonds, and mortgages, embracing also fiduciary debts of every character due from trustees to *cestuis que trust*": *Garrett v. Garrett*, 69 Ala. 429. It is impliedly recognized as applicable to the claim of plaintiff in *Hawkins v. Glenn*, 131 U. S. 319, where it is said: "And here there was a deed of trust made by the debtor corporation for the benefit of its creditors, and it has been often ruled in Virginia that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment." Also, *Hamilton v. Glenn*, 85 Va. 901, was a suit by the present plaintiff to collect the call of December, 1880. The decision, that the claim was barred by the statute of limitations, is placed on the ground, that "the lien of the trust deed is not barred by any period short of that sufficient to raise a presumption of payment."

The evidence shows that a call was ordered by the Richmond chancery court in December, 1880, but the record does not disclose any evidence showing the institution of proceedings against defendant to enforce its collection. Appellee insists that the delay in making the call was owing to the

failure of the officers of the corporation, who were the agents of the stockholders, and that the negligence of their agents may be well visited on them; that there has been no laches or improper delay on the part of the creditors. It was certainly the duty of the company to make the call as soon and whenever it was ascertained that payment of the subscriptions was necessary to meet the demands of creditors. But when the deed of trust was executed, the trustees, who represented the creditors as well as the corporation, had authority to collect the subscriptions, and if a call by a court was deemed essential or proper, to institute proceedings for that purpose. In consequence of their failure to do so, the creditors' bill was filed in December, 1871. With the exception of service of process upon two of the individual defendants, no steps were taken, not even process to bring the corporation before the court, and the suit remained quiescent until August, 1879, when the amended and supplemental bill was filed; and no call was made until December, 1880, nine years after the filing of the bill. Certainly this long, and so far as the record shows unexplained, delay cannot be attributed to the stockholders or their agents.

It is further insisted that the effect of a call by order of the court rebuts the presumption of payment arising from the lapse of time, on the ground that the stockholders were represented in that suit by the corporation, and that the decree making the call is a judicial assertion of the liability of the stockholders, binding them personally. The stockholders were represented by the corporation, so far as to render binding on them the decrees of the court in respect to corporate matters, and their property rights and interests in the corporation. The decrees of the Richmond chancery court may be regarded as having adjudged the fact and amount of the corporate indebtedness; that the creditors were not barred from asserting their claims as against the corporation; and that calls were necessary to meet their demands, which the court had authority to order, and did order. For these purposes the stockholders were not necessary parties; and being represented by the corporation, the decrees, in the respects above stated, are binding on them; but they cannot legally operate to fix a personal liability on the stockholders who were not made parties. Making a call by the court authorized the trustees to bring suits against the stockholders, or those claimed to be stockholders, in courts having jurisdiction over them person-

ally. The suit in the chancery court is in no sense a suit against the individual stockholders. No decree was rendered adjudging who were stockholders, but merely the number of shares issued, and the places where held. No more binding effect ought to be given to a call made in such suit by the court than would be given to a call made by the corporation itself, unless the individual stockholder is a party, and his personal liability determined. It will scarcely be contended that had the corporation continued business, a call, though made within twenty years from the organization, would, without the commencement of proceedings for its enforcement, be efficient to rebut the presumption of payment. The legal effect of a decree in such suit is not to deprive the stockholder of, or impair, any personal defense he may have. In a suit against him to collect the call, he may, notwithstanding the decrees, show that he is not a stockholder, though his name may appear on the books of the corporation, or that he has paid his subscription in full, or set up any other available personal defense. "Due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered against him": Cooley's Constitutional Limitations, 499. As to claims of the corporation against a stockholder for subscription to the capital stock, they are adversary parties; and as to such adverse interests, one cannot represent the other.

The doctrine of prescription rests on principles different from the statute of limitations. The presumption of payment is not countervailed by evidence of intervening infancy, coverture, or any disability of suit. In *Harrison v. Heflin*, 54 Ala. 552, speaking of the effect of the suspension of the statutes of limitation during the war, upon the presumption arising from the lapse of time, it is said: "This may acquit suitors of the imputation of laches; but the presumption rests, not only on want of diligence in asserting rights, but on the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which, it has been said, have often more cruelty than justice in them; that it conduces to the peace of society and the happiness of families, and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible."

We can perceive no sufficient reason why claims of the nature of plaintiff's should be excepted from the operation of the

rule, when no sufficient cause is shown for the long delay. On the foregoing well-established principles in this state, nothing short of a recognition of right or admission of liability, or the institution of legal proceedings against the stockholder sought to be charged, within twenty years, will prevent the presumption of payment from becoming conclusive.

The foregoing principles will serve as a sufficient guide on another trial.

Reversed and remanded.

CORPORATIONS — CALLS FOR UNPAID SUBSCRIPTIONS. — As to equitable jurisdiction to compel the payment of unpaid subscriptions, or to make calls, see extended discussion in note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 810-814, 855-857. Where the corporate property, including unpaid subscriptions, has been conveyed to secure its debts, which, though barred by the statute of limitations, are not extinguished, equity will aid in enforcing their payment: *Hamilton v. Glenn*, 85 Va. 901.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST CREDITORS' CLAIMS FOR UNPAID SUBSCRIPTIONS until a call is made, or the corporation ceases to be a going concern: Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 827-829; *Barrick v. Gifford*, 47 Ohio St. 180; 21 Am. St. Rep. 798; *Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178; *Glenn v. Howard*, 81 Ga. 283; 12 Am. St. Rep. 318.

CORPORATIONS. — CONCLUSIVENESS OF A JUDGMENT AGAINST A CORPORATION in a creditors' suit to reach unpaid subscriptions: See note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 814, 815, 858.

POWERS OF ASSIGNEES FOR THE BENEFIT OF CREDITORS, or assignees in bankruptcy, and of receivers, with respect to unpaid subscriptions: See note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 833-834.

CORPORATIONS — EVIDENCE — STOCK-BOOKS. — The stock-books of the corporation are *prima facie* evidence of the ownership of stock in those names appearing therein as stockholders, for the purpose of charging them individually with the corporate debts: Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 866, 867.

BANCROFT v. OTIS.

[81 ALABAMA, 279.]

WILLS — CONFIDENTIAL RELATIONS — PRESUMPTION OF UNDUE INFLUENCE — BURDEN OF PROOF. — The mere existence of confidential relations between the proponent and principal beneficiary under a will and the testator will not, without more, raise a presumption that the will was procured by the proponent by means of undue influence over the testator, nor cast the burden of proof on him to show that the will was executed without the exercise of undue influence, coercion, or fraud on his part. In addition to the existence of such confidential relations, the proponent must exercise some active interference in the preparation or execution of the will, to raise the presumption of undue influence on his part.

PRACTICE — ARGUMENTATIVE INSTRUCTIONS. — Additional force need not be given to the argument of counsel by embodying in the instructions a request that the jury “may look to” or “consider” this or that fact. The giving of such instructions, however, is not reversible error.

PRACTICE — MISLEADING INSTRUCTIONS. — The giving of misleading instructions is not reversible error, when such instructions might have been, but were not, met and remedied by requests for explanatory instructions.

PRACTICE — ABSTRACT INSTRUCTIONS. — The giving of abstract instructions is not reversible error, unless the record shows that their effect was to mislead the jury to the appellant’s injury.

CONTEST of the probate of the will of W. Otis, deceased, propounded for probate by C. M. Bancroft, who was named therein as executor and principal devisee and legatee. The proponent was a step-son of the testator, and for many years had been his partner in business. The will was contested by W. Otis and others, heirs at law of the testator, on the ground of undue influence and fraud on the part of the proponent. Judgment for the contestants, and the proponent appealed.

L. H. Faith, and Hamiltons and Gaillard, for the appellant.

Greg. L. and H. T. Smith, and Gaylord B. and Frank B. Clark, for the appellees.

McCLELLAN, J. The present appeal brings under review, *inter alia*, certain instructions, thirteen in number, given by the judge below to the jury at the request, in writing, of the contestants. Of these, the first, second, twelfth, and thirteenth state substantially one and the same proposition, and will be considered together. That proposition is, in short, that if, upon the contest of a will, it be shown that confidential relations existed between the proponent, he being also the principal beneficiary, and the testator, the law, without more, indulges the *prima facie* presumption that the testament was procured to be executed by him through the exercise of undue influence over the mind of the testator, and puts upon him the *onus* of rebutting this presumption, by affirmative evidence that the testamentary act was not induced or procured by coercion or fraud on his part.

For giving these instructions the trial judge had the very highest authority that could have obtained in the premises,—an adjudication of the supreme court of Alabama. The point was fairly presented and directly ruled in the case of *Moore v. Spier*, 80 Ala. 129,—an opinion concurred in by the whole court. It appeared in that case that confidential relations,

much of the character of those shown here between Bancroft and William Otis, deceased, existed between the proponent and principal devisee, one Spier, and the testatrix. "He was her trusted agent, having the general management of her property and business." He was related to her. He had by kindness acquired great influence over her. It did not appear that this influence was illegitimate, or that it had been unduly, or at all in fact, exercised in securing the large testamentary provision which she made for him. Yet the court said: "Under the rule laid down by this court in *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528, and *Waddell v. Lanier*, 62 Ala. 347, the burden of proof, in our opinion, was cast on the devisee to show that the will in question was not superinduced by fraud or undue influence, but was the result of free volition on the part of the testatrix. We need not add anything more here by way of discussion to what is said in these cases, except that this rule as to the burden of proof is one of public policy, designed to prevent the abuse of certain confidential relationships, and to preserve them free from the taint of an overreaching selfishness." And, following this case, it was said in *Lyons v. Campbell*, 88 Ala. 469, that "whenever a confidential relation exists, such as principal and agent, during the lifetime of the deceased, continuing to his death, and the agent is a favored legatee under the will, the presumption or inference is, that by improper acts or circumventions—by the exercise of some undue influence—the testator was induced to bestow the gift or legacy contrary to his desire and free-will; and the burden of proof is cast on the legatee to show that the will was the result of his own volition, and not procured by fraud or undue influence." And somewhat similar language is employed in the case of *Daniel v. Hill*, 52 Ala. 437, though when read in the connection in which it there occurs, it can probably not be said to sustain the proposition of the charges we are considering, as *dicta* even. It is at once apparent, therefore, that to the imputation of error to the lower court in the instructions referred to it is essential that one, at least, of the former decisions of this court must be overruled, another limited, and yet another explained. Before reaching such a conclusion, we ought, of course, to be very sure of our footing, not only on authority, but especially on reason and principle; for if the position taken by this court can find justification and support in logical deduction from recognized legal truths, it should, I apprehend, be sustained, notwithstanding a con-

servative respect for the adjudged cases of other jurisdictions and the opinions of text-writers, might incline us to another result if the question were a new one in this court.

Recurring, then, to *Moore v. Spier*, 80 Ala. 129, it is to be noted that the doctrine there announced is made to rest on the cases of *Shipman v. Furniss*, 69 Ala. 555, and *Waddell v. Lanier*, 62 Ala. 347. An examination of those cases discloses that each of them involves a contract, and not a will, — a transaction between living persons, by which, while both are *en esse*, one claims some advantage of the other, and not a transaction out of which property is received by one as a gift on the death of the other. Those cases are authority for the doctrine of *Moore v. Spier*, 80 Ala. 129, therefore, only on the assumption that the same rule in this respect applies to devises, bequests, and wills, as obtains in regard to gifts, conveyances, and contracts *inter vivos*. The same may be said of that part of the opinion in *Lyons v. Campbell*, 88 Ala. 469, which is quoted above, so far as it is rested on *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528, and *Waddell v. Lanier*, 62 Ala. 347. And moreover, it is to be noted that in *Lyons v. Campbell*, 88 Ala. 469, the decision turned, not upon the existence of confidential relations alone, but in connection with the further facts that the proponent was not only active in procuring the will to be written, but gave the directions as to its contents to his own son, who wrote it, and induced its execution by fraudulent misrepresentations as to the value of the residuary estate which was bequeathed and devised to him, so that the language quoted from that case was essentially a mere *dictum*, and gives no additional force to the opinion in *Moore v. Spier*, 80 Ala. 129. Similarly, what is said in *Daniel v. Hill*, 52 Ala. 437, apparently in line with *Moore v. Spier*, 80 Ala. 129, is not so when reference is had to the facts of the case, and when that part of the opinion relied on is read in connection with that which precedes and follows it. There is no other case in Alabama which, either in the terms of the opinion or in the matter decided, can be construed or contorted into support of the proposition that confidential relations alone infect a will with the taint of *prima facie* invalidity, and shift the burden of proving that it is the result of the testator's free agency on the proponent. In other jurisdictions we find but two adjudged cases which in any degree support that doctrine. One of these is *St. Leger's Appeal*, 34 Conn. 434, 450, 91 Am. Dec. 735, which contains a *dictum* to

the effect that "the law presumes undue influence from confidential relations between the testator and principal legatees or devisees, and that the burden is upon them to show by satisfactory proof that such presumed influence did not in fact or in any degree induce" the making of the will in their favor. The other is the case of *Meek v. Perry*, 36 Miss. 190, in which it was held by a divided court "that the principles of law which protect the interests of wards in transactions with their guardians extend to wills made by them in favor of their guardians; and hence a testament made by a ward in favor of his guardian will be held void for want of capacity in the ward, unless the legal presumption is rebutted by proof."

On the other hand, the authorities to the converse of the proposition declared in *Moore v. Spier*, 80 Ala. 129, as to wills, and embodied in the charges under consideration, are almost too numerous to be cited. The position taken by them is, that the reasons of the rule which impute undue influence to confidential relations in respect of contracts and transactions *inter vivos* do not apply to wills, and that before testamentary disposition can be presumed to have been unduly influenced, something in addition to the mere existence of confidential relations must be shown; as that the proponent initiated the preparation of the instrument, or wrote it himself, or gave directions as to its contents to the draughtsman, or selected the witnesses to be present at its execution, and the like; or in short, that the beneficiary whose interest under the paper is attacked was as a matter of fact — aside from mere presumption of law — active in respect to or in some way connected with the preparation and execution of the alleged will. According to this line of authority, confidential relations, coupled with some act done in the premises, raise the presumption of undue influence against the proponent, in a case like the present one, but no manner or degree of confidential relationship, of and by itself, will suffice to thus cast the burden of proving that the testamentary act was not unduly influenced upon him: Schouler on Wills, sec. 246; 1 Jarman on Wills, 35, 36, and notes; 1 Redfield on Wills, 537; *Gardiner v. Gardiner*, 84 N. Y. 155, 163; *Tyler v. Gardiner*, 35 N. Y. 559; *Post v. Mason*, 91 N. Y. 539; 43 Am. Rep. 689; *Cudney v. Cudney*, 68 N. Y. 148; *Hagan v. Yates*, 1 Demarest, 584; *Elliott's Will*, 2 J. J. Marsh. 341; *Bleecker v. Lynch*, 1 Bradf. 458; *Tyson v. Tyson*, 37 Md. 567; *Rutherford v. Morris*, 77 Ill. 397; *Seckrest*

v. *Edwards*, 4 Met. (Ky.) 163, 174; *Baldwin v. Parker*, 99 Mass. 79, 85; 96 Am. Dec. 697; *McKeone v. Barnes*, 108 Mass. 344; *Waddington v. Buzby*, 48 N. J. Eq. 154; *Dale's Appeal*, 57 Conn. 128; *Wheeler v. Whipple*, 44 N. J. Eq. 141, 145; *Boyse v. Rossborough*, 6 H. L. Cas. 2, 48; *Parfitt v. Lawless*, L. R. 2 Pro. & D. 462; *Mackall v. Mackall*, U. S. Sup. Ct., 1890.

None of these texts or cases impugn the doctrine of *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528, and *Waddell v. Lanier*, 62 Ala. 347; but they take a distinction as to the vitiating effect of confidential relations *per se*, in respect to transactions *inter vivos* on the one hand, and testamentary dispositions on the other; they sustain the conclusions reached in the cases last named, while condemning that of *Moore v. Spier*, 80 Ala. 129. Thus Mr. Schouler says: "Equity appears often to have so far presumed a fraud, where one holding such a confidential relation takes a gift, as at least to have imposed upon him the *onus* of disproving it. Certainly no such strict rule pertains to the law of wills; . . . and where it does not appear that the fiduciary draughted the will, advised as to its contents, or even knew that it was to be made, there can be no imputation of fraud or undue influence": Schouler on Wills, sec. 246. In *In re Smith's Will*, 95 N. Y. 523, Andrews, J., after stating the rule obtaining *inter partes*, that the existence of confidential relations between attorney and client, guardian and ward, trustee and *cestui que trust*, and other persons one of whom is subject to the control of the other, raises up a presumption of undue influence when the dominant party obtains a benefit or advantage of the other, proceeds: "The rule to which we have adverted seems, however, to be confined to cases of contracts or gifts *inter vivos*, and does not apply, in all its strictness at least, to gifts by will. It has been held that the fact that the beneficiary was the attorney, guardian, or trustee of the decedent does not alone create a presumption against a testamentary gift, or that it was procured by undue influence": *Coffin v. Coffin*, 23 N. Y. 9; 80 Am. Dec. 235.

In *Tyson v. Tyson*, 37 Md. 583, it is said that the doctrine of confidential relations adopted by courts of equity, in regard to contracts *inter vivos*, by which a presumption of undue influence is indulged, casting the burden of proof on the party receiving a gift or advantage, can have no application to wills; and to this proposition is cited the case of *Parfit v. Lawless*, L. D. 2 Pro. & D. 462, where the point underwent a very

exhaustive consideration; and the application to wills of the doctrine obtaining with respect to gifts *inter vivos*, between persons occupying confidential relations to each other, was flatly and unqualifiedly denied. In delivering the opinion of the court, Lord Penzance observes: "This rule was granted in order to consider a suggestion, strongly pressed, that the rules adopted in courts of equity in relation to gifts *inter vivos* ought to be applied to the making of wills. In equity, persons standing in certain relations to one another — such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward — are subject to certain presumptions, when transactions between them are brought in question; and if the gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that having done so, the *onus* was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been and is not the law in this or any other court, in regard to wills": Page 468.

We need not pursue this branch of the discussion further. Other texts and adjudged cases might be cited and collated to the same effect of those already adverted to. But it is not necessary, we think. Enough has been said to demonstrate that the overwhelming weight of authority is against the conclusion reached by this court in the case of *Moore v. Spier*, 80 Ala. 129. Not only so, but it has also been demonstrated upon authority that the doctrine of *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528, and *Waddell v. Lanier*, 62 Ala. 847, is an entirely different matter from the question presented in *Moore v. Spier*, 80 Ala. 129, and cannot be called, with any degree of plausibility even, to the support of the proposition there announced as applicable to wills. No reasons are given, it may be noted, for the conclusion there attained, except by adoption of the reasoning of the two earlier cases cited, which was not pertinent to the question in hand, and enforced a result not referable to analogous considerations.

Yet, notwithstanding all this, we would still feel constrained, as before stated, to adhere to *Moore v. Spier*, 80 Ala. 129, if it could be supported on principle, whatever violence to recognized authority might be involved in such a course. We do not think, however, that the result there reached can be logically sustained. The doctrine of presumed undue influence against the dominant party, in transactions *inter vivos*, seems to us eminently sound and just. It proceeds, primarily, upon the natural assumption that a living person, having, it is to be supposed, a need for his property, or at least a desire to retain it, during life, will not part with it without a measurably adequate equivalent. Where it is made to appear that he has given it away, and that to one who occupies a position of domination in relation to him, the presumption still is, that he has not freely deprived himself of it and its use and enjoyment, but that his act was induced by the undue exercise of the influence which the beneficiary is shown to have had over him; and this presumption must be met by the donee and rebutted, else, in equity, it becomes as a fact proven, — a vitiating factor in the transaction. With respect to testamentary dispositions, the primary presumption upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts *inter vivos* rests is entirely lacking. They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be, with respect to them, no assumption that the donor would not voluntarily part with his property, since in the nature of things it must then pass from him to others, selected by himself according to the dictates of his affections, or appointed by the law of descents and distributions; and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality, that the property should cease to be his, and should become that of another. And the very considerations which lead to suspicion, which must be removed in transactions *inter vivos*, — friendship, trust and confidence, affection, personal obligations, — may, and generally do, justly and properly give direction to testamentary dispositions.

Another very cogent reason for the distinction recognized by the authorities between the two classes of transactions, with respect to casting the *onus probandi* on the issue of undue influence *vel non*, rests on the difference in the attitude which is sustained by a donee or grantee on the one hand,

and a devisee or legatee on the other, to the act sought to be impugned. It is one of the leading principles of law in this connection that the burden of proof as to a particular fact is ordinarily upon the party who is in a position to know the truth in respect thereto, and is not, except in certain cases governed by rules which do not obtain here, imposed upon the party who is not supposed to have knowledge in the premises. Transactions *inter vivos* are necessarily transactions *inter partes*. The donee or grantee is present at the time of, or at least knows of and accepts, the donation or grant made to him. He, in the very nature of things, is in a position to know all the circumstances of the transaction, and to enlighten the court and jury in regard to them. To require him to do so, therefore, is in harmony with the general rule, and imposes no hardship on him. These reasons for the rule in respect to transactions *inter vivos* do not obtain with respect to a will. The beneficiary is not a party to its execution, and may in fact know nothing of it for years after, nor indeed till the death of the testator; "and," to again quote Lord Penzance, "to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motive the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many if not most cases he could not possibly discharge"; and would be, we may add, in many if not most cases to destroy a will, not because its execution was the result of coercion or fraud, but because a party who cannot be presumed to know the facts has failed to testify as to them.

Other reasons might be enlarged upon for the distinction we are considering. We will content ourselves with a passing reference to one or two.

The undue influence which will avoid a will must amount to coercion or fraud,—ideas which involve actual intent to control the testator against his will. The law never presumes fraud or the evil intent and unlawful acts essential to the coercion here contemplated. There must be some proof of these things. They cannot be considered to have been done merely because the proponent had the power to coerce or to defraud. Undue influence with respect to gifts and conveyances *inter vivos* is a very different matter. It may exist without either coercion or fraud. It may result entirely from the confidential relation, without activity in the direction

either of coercion or fraud on the part of the beneficiary occupying the position of dominant influence. It is upon him not only to abstain from deceit and duress, but to affirmatively guard the interests of the weaker party, so that their dealing may be upon a plane of equality, and at arms-length. To presume undue influence in such case, therefore, is not to presume fraud or coercion, or any act which is *malum in se*, but simply the continuance of the influence which naturally inheres in and attaches to the relation itself.

Again, it is said that the equitable doctrine that contracts, gifts, etc., between parties occupying confidential relations will be presumed to have resulted from undue influence cannot be applied to wills, because they are not of equitable cognizance, but their validity was formerly determinable as to realty in an action of ejectment by the heir, and as to personalty in the ecclesiastical courts, and as to both, in our jurisprudence, is triable by a common-law jury in a court not invested with the administering of the principles of equity: Authorities *supra*, and *Lee v. Lee*, 71 N. C. 145, where it is said: "This equitable doctrine [of presumed undue influence from confidential relations] has never been understood as applying to wills. To so apply it would raise a presumption against every will in favor of a child, a wife, a father, or other relative, and would defeat probably one half the wills propounded for probate." See also Adams's Equity, 176, to the effect that "the avoidance of transactions on the ground of fraud is a copious source of jurisdiction in equity. With respect to fraud used in obtaining a will this jurisdiction does not exist."

The discussion need not be further pursued. Our consideration of the authorities, and also of the reasons which underlie the true doctrine in the premises, drive us to the conclusion that the case of *Moore v. Spier*, 80 Ala. 129, is unsupported by either, and must be overruled. And we return to the rule as it was really held in *Lyons v. Campbell*, 88 Ala. 462, and other adjudications of this court, that the existence of confidential relations between the testator and principal or large beneficiary under the will, coupled with activity on the part of the latter in and about the preparation or execution of the will, such as the initiation of proceedings for the preparation of the instrument, or participation in such preparation, employing the draughtsman, selecting the witnesses, excluding persons from the presence of the testator at or about the time

of the execution, concealing the making of the will after it was made, and the like, will raise up a presumption of undue influence, and cast upon him the burden of showing that it was not induced by coercion or fraud on his part, directly or indirectly; but that no such presumption can be predicated alone on confidential relations: *Hill v. Barge*, 12 Ala. 687; *Daniel v. Hill*, 52 Ala. 430, 437; dissenting opinion of Handy, J., in *Meek v. Perry*, 36 Miss. 190, approved in *Daniel v. Hill*, 52 Ala. 430; *Wheeler v. Whipple*, 44 N. J. Eq. 142; Bailey on Onus Probandi, 385-407; *Leeper v. Taylor*, 47 Ala. 221.

We do not deem it necessary to examine in detail the remaining charges given at the instance of the contestants. Several of them are open to the objection of being argumentative; such, for instance, are those numbered 3, 3 a, and 4. It is not stating an erroneous proposition of law to inform the jury that they "may look to" this fact, or "may consider" that fact, or that a certain other fact "is pertinent to the inquiry," etc., for all evidence properly admitted is pertinent, and the jury undoubtedly has the right to look to and consider any fact which has been adduced before them; and hence no reversal can result from the giving of such charges. But while all this is true, the court is under no duty to accentuate, emphasize, and give additional force to the argument of counsel by embodying them in his instructions to the jury: *Hawes v. State*, 88 Ala. 89; *Rains v. State*, 88 Ala. 91; *Riley v. State*, 88 Ala. 193; *Carrington v. Louisville etc. R. R. Co.*, 88 Ala. 472; *Pellum v. State*, 89 Ala. 82; *Kirby v. State*, 89 Ala. 64; *Watkins v. State*, 89 Ala. 89; *Hussey v. State*, 86 Ala. 34.

Others of the instructions may be faulty in that they tend to mislead the jury, but such tendency would not avail to reverse the judgment. It should have been met and remedied by requests for explanatory instructions. Nor need we refer specially to the instructions which are claimed to be abstract. That infirmity, if it exists, could not be made the basis of revisory action on our part, unless we could see the effect of it was to mislead the jury to appellant's injury.

It is unnecessary to the disposition of this appeal that we should definitively pass upon charge numbered 5, bearing upon the testimony of the physician in respect to the mental condition of the testator. It will suffice to say that we are not clear but that that charge involves error, as being an invasion of the province of the jury.

We shall not consider the point urged upon us with respect to the verdict of the jury. Were that question determined in the line of appellant's insistence, it would still rest in the discretion of the court either to reverse the judgment below and render judgment here, or to reverse the judgment and remand the cause; and in the exercise of that discretion, we should send the case back for retrial in the probate court, as we now do, pretermittting consideration of the sufficiency and effect of the verdict.

For the errors committed in giving charges 1, 2, 12, and 18, the judgment is reversed and the cause remanded.

WILLS — PRESUMPTION OF UNDUE INFLUENCE — BURDEN OF PROOF. — When the person who draughts a will, or participates in procuring it, occupies a relation of confidence towards the testator, and would not be a beneficiary in the absence of the will, the presumption of undue influence arises, and the burden of proof is upon him to show that the testator executed the will freely, and of his own accord: *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85, and extended note; *Miller v. Rivers*, 133 Pa. St. 270.

CARLISLE v. KILLEBREW.

[91 ALABAMA, 251.]

JUDGMENT — AMENDMENT OR ANNULMENT OF. — A court cannot alter, vary, or annul its final judgment after the close of the term at which it was rendered, except to correct clerical errors or omissions, or when the judgment is void on its face, either for want of jurisdiction of the subject-matter or of the parties.

JUDGMENT — UNCERTAINTY IN DESCRIPTION. — A judgment in ejectment describing the land as "fraction No. 12, a part of the southeast quarter and northeast quarter of section 16, township 4, range 4, containing 24.75 acres," and following the description in the pleadings and verdict, is not void on its face for uncertainty in description.

APPEAL from a judgment overruling a motion to set aside a judgment in ejectment.

H. L. Martin, for the appellant.

H. H. Blackman, for the appellee.

COLEMAN, J. A court is without power to alter, vary, or annul final judgments after the close of the term at which they were rendered, unless it be for the correction of clerical errors or omissions. When a court, however, has rendered a judgment void on its face, either from a want of jurisdiction of the subject-matter or of the parties, such judgment may

be vacated at any subsequent term: *Buchanan v. Thomason*, 70 Ala. 402; *Baker v. Barclift*, 76 Ala. 417; *Cox v. Jones*, 40 Ala. 297.

Every judgment of a court of justice must be perfect in itself, or capable of being made perfect by reference to the pleadings or to the papers on file in the cause, or to other pertinent entries on the docket: *Alexander v. Wheeler*, 69 Ala. 842. In the case in 69 Alabama, the verdict was, "We, the jury, find for the plaintiff for the land running to the Ferguson and Allen line," and the judgment followed the verdict. The verdict was special, evidently, for a part of the land sued for, and there was nothing in the pleadings or papers on file, or entries, to define where the Ferguson and Allen line was. The judgment was held void for uncertainty: *Jenkins v. Noel*, 8 Stew. 74.

In the case under consideration, the judgment of the court follows the pleadings, and the lands described in the judgment accord exactly with those in the declaration. In ejectment, a general verdict is sufficient: *Chapman v. Holding*, 60 Ala. 522. A verdict for the land in the declaration described has been held to be sufficiently specific, although the declaration does not precisely ascertain the quantity or boundaries: *Tyler on Ejectment*, 581. If the verdict is for a less number of acres than mentioned in the declaration, it is necessary to describe either the lands to be recovered or those denied by the verdict: *Tyler on Ejectment*, 785, 821. When the judgment refers to some monument or existing thing to designate a boundary, it is sufficient: *Bennet v. Morris*, 9 Port. 173. Where no statute controls, the certainty of a verdict may be established by a reference in it to monuments on the ground, to recorded deeds, or diagrams filed of record, or to warrants of survey, or to an "old hedgerow": *Sedgwick and Wait on Trial of Title to Land*, secs. 499, 501. Declaration describing land as a certain lot, designating it by number, in a certain town, or according to a certain plat, is sufficient.

These authorities are ample to show that the description need not be such as the court judicially knows to be a subdivision of land. "It is by no means essential that from a mere inspection of the description the court should be enabled to know what lands were intended. The tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may be received to

show the signification of such a name, or to show that any other descriptive words, though apparently meaningless or uncertain, do in fact designate a particular tract in such manner that its identity would be apparent to persons with whom it is familiar": See *De Sepulveda v. Baugh*, 74 Cal. 468; 5 Am. St. Rep. 455, and note; Freeman on Executions, sec. 281.

Under these principles, we hold that a judgment describing the lands as "fraction No. 12, a part of the southeast quarter and northeast quarter of section 16, township 4, range 4, containing 34.75 acres," and which description follows that in the declaration, is not void upon its face: *Carlisle v. Killebrew*, 89 Ala. 334. The exact number of acres is given, and there may be "diagrams," "surveys," "plats," from which the exact limits and boundary lines of "fraction No. 12" may be ascertained. We have not considered the evidence introduced on the motion to vacate the judgment. If legal, such would only confirm the correctness of the conclusion to which we have arrived. "Where a patent has been issued by the proper officers of the United States, the presumption is that it is valid, and passes the legal title. It is, furthermore, *prima facie* evidence, of itself, that all the incipient steps had been regularly taken before the title was perfected by the patent": *Schnee v. Schnee*, 23 Wis. 877; 99 Am. Dec. 184.

The governor's patent to these lands designates them as "fraction No. 12," and the further description in the patent is the same as that of the judgment. The question as to whether the governor issued more patents than one to different persons for the same land, or patents for more land than the section contained, or who has the superior title to the land in controversy, or whether there is such error in the judgment as would require a reversal on appeal, does not arise on the record, and cannot be considered.

Affirmed.

JUDGMENTS — AMENDMENT OR ANNULMENT OF, AFTER CLOSE OF TERM. — Amendments of judgments will only be permitted in the furtherance of justice: *Indiana etc. R'y Co. v. Bird*, 116 Ind. 217; 9 Am. St. Rep. 842, and note. A court cannot at a subsequent term amend, modify, or annul a regular judgment, except as provided by statute: *Cook v. Moore*, 100 N. C. 294; 6 Am. St. Rep. 587, and note. Judgments cannot be amended for error of court after the end of the term: *Speed v. Hann*, 1 T. B. Mon. 16; 15 Am. Dec. 78; *Morgan v. Hays*, Breese, 126; 12 Am. Dec. 147, and note; *Corn etc. Bank v. Blye*, 119 N. Y. 414; *County of Cook v. Calumet etc. Canal etc. Co.*, 131 Ill. 505.

GRIFFITH v. VENTRESS.

[91 ALABAMA, 303.]

INFANTS — JUDGMENT AGAINST, WITHOUT APPOINTING GUARDIAN AD LITEM. — A decree *pro confesso* divesting the legal title to land out of infant defendants not represented by guardian *ad litem* is wholly irregular, and must be reversed.

DEEDS, ACKNOWLEDGMENTS OF — JURISDICTION TO CORRECT. — The power conferred on certain officers to take acknowledgments of deeds is statutory; and courts of law or equity have no jurisdiction to amend or correct defective executions of such power.

ACKNOWLEDGMENTS — POWER OF OFFICER TO CORRECT. — An officer before whom the acknowledgment of a conveyance of land is made acts judicially when certifying to the acknowledgment; and when the conveyance so acknowledged is delivered to the parties, and accepted for record, or as the complete execution of the instrument, he has no power to alter, add to, or make a new certificate, without a reacknowledgment.

ACKNOWLEDGMENTS — POWER OF OFFICER TO CORRECT. — Where the certificate of acknowledgment of a mortgage of a homestead by a husband and wife is fatally defective, the officer making the certificate has no power to correct it at a subsequent time, nor to attach thereto a new and valid certificate.

Jere N. Williams, for the appellants.

Roquemore, White, and McKensie, and George W. Peach, for the appellee.

COLEMAN, J. The record contains the following statement of facts: On and prior to the twelfth day of January, 1879, Thomas Ventress was possessed of and owned in fee certain lands described in the pleadings, and on that day sold the same to Junius Griffith and Jere Griffith, put the vendees in possession, and executed his bond to make them valid titles upon the payment of the expressed consideration. The entire purchase-money was afterwards paid, but Thomas Ventress died without executing a deed of conveyance as provided for in his bond for titles. Prior to the death of Thomas Ventress, but after he had received the entire purchase-money, one of his vendees, on the 31st of January, 1885, executed a mortgage to the said Thomas Ventress on his entire half-interest in the lands, to secure the payment of a new indebtedness for the sum of \$619.66. Both Junius Griffith and Jere Griffith were married, and with their wives respectively occupied the lands purchased, but separate parts, as their respective homesteads. These lands are situated in the county, comprise in toto 365 acres, and are of less value than \$2,000.

James C. Ventress, the appellee, qualified as the administrator of Thomas Ventress, and as such administrator brought suit in ejectment, and recovered the entire lands, and damages for the detention thereof, by virtue of the legal title of his intestate, and from which he had never parted, and not upon the title conveyed to him by the mortgage. After his purchase, Jere Griffith died, and left surviving him Isham Griffith and Sarah Noble. Thomas Ventress left several adult heirs, and also Ellen J. Taylor, a minor over fourteen years of age, and John Taylor, Mary L. Taylor, and other minors under fourteen years of age. All the minors are non-residents.

The wife of Junius Griffith signed the mortgage with her husband. The acknowledgment was taken before J. H. Alston, probate judge of Barbour County, on the day of the date of the mortgage, to wit, the 31st of January, 1885. This certificate of the acknowledgment by the wife is defective and insufficient to make the mortgage valid as to the homestead. After the filing of this bill, to wit, on the 20th of August, 1889, the probate judge made and added a new certificate to the mortgage, complying in all respects with the law as to conveyances of the homestead. It does not appear that Junius Griffith or his wife knew of or consented to the additional certificate.

The object of the present bill is to divest the legal title out of the heirs of Thomas Ventress, and invest the same in the complainants, and to have the mortgage declared null and void, because the certificate of the acknowledgment by the wife of Junius Griffith was fatally defective.

It has been often decided by this court that parties in whom the legal title is vested must be in court, before a decree can be properly rendered divesting them of their title. In all cases where minors are interested as material defendants, they must be represented by a guardian *ad litem* properly appointed: *Hibbler v. Sprowl*, 71 Ala. 50. A decree *pro confesso* against minor defendants not represented by a guardian *ad litem* is wholly irregular; and in cases where the legal title is vested in them, it is the duty of this court to reverse the case and remand the cause, that they may be properly made parties, and their interest protected. The record shows a decree *pro confesso* against Ellen J. Taylor, John Taylor, and other minor defendants, and it fails to show that they have at any time been represented by a guardian *ad litem*.

James C. Ventress, individually and as the administrator of Thomas Ventress, answered the bill, and by cross-bill sought a foreclosure of the mortgage. The difficult question in the case is as to the legality of the new certificate made by the probate judge to the mortgage on the 20th of August, 1889, — over four years after the first certificate, and after the expiration of the term of office held by him when he made the first certificate, although he had been re-elected, and was occupying the same official position when he made the second certificate.

The question has never been directly before this court, and the authorities are not in harmony. In the case of *Cox v. Holcomb*, 87 Ala. 591, 13 Am. St. Rep. 79, it is stated: "While no case has been heretofore presented in which the wife was in fact examined separate and apart from her husband touching her signature to an alienation of the homestead, and made the statutory acknowledgment of her voluntary signature and assent, and the officer before whom the acknowledgment was made omitted to certify in substantial compliance with the statute, the principles which underlie the case, and are decisive of the question involved, should be regarded as well settled. An alienation of the homestead by a married man, not executed by the wife in the manner prescribed by the statute, has been uniformly held to be a nullity. . . . The constitution and statute have reference to some mode of alienation by which the title passes *in præsenti*." It has been uniformly held that courts of equity, in the absence of statutory authority, cannot relieve against the defective execution of a power created by statute, nor supply any of the formalities requisite to its due execution.

The sustain the authority of the probate judge to add his last certificate, and thereby render the mortgage valid, we have been referred to a statement of the court made in the case of *Carlisle v. Carlisle*, 78 Ala. 544, and of *Cox v. Holcomb*, 87 Ala. 591, 13 Am. St. Rep. 79, just cited. It will be seen from the extract quoted from the latter case that the court stated that the precise question had never arisen in this state. In the case of *Carlisle v. Carlisle*, 78 Ala. 544, the justice of the peace before whom the acknowledgment was made failed to sign the certificate. It was not contended that the certificate was sufficient, or that the justice of the peace could then affix his signature, so as to make the certificate valid. In the body of the certificate the name of the justice appeared, and the

attempt was made to show that his name was written by the justice himself, and thus to bring the certificate within the principle laid down in *Sharpe v. Orme*, 61 Ala. 263, and *Rogers v. Adams*, 66 Ala. 600, where it was held that a defective certificate of acknowledgment "may, from necessity, operate as a substitute for the formal attestation of a witness." In the case of *Carlisle v. Carlisle*, 78 Ala. 544, the justice had ceased to be a justice, and had removed from the county in which he held the office of justice of the peace. At the conclusion of the opinion, the court stated: "The officer who filled the blanks in the printed form on the deed has ceased to be such officer, and is unauthorized to make a certificate as justice of the peace in Pike County, to have effect by relation as if done at the time he was acting as such officer." No authority is cited, and the question now under consideration was not involved in that case, and not determined.

At the close of the opinion in the case of *Cox v. Holcomb*, 87 Ala. 592, 13 Am. St. Rep. 79, the court says: "The officer taking the acknowledgment may, during his continuance in office, voluntarily correct his certificate, or make a new one conforming to the statute, if the facts warrant; but a court of equity will not assume to correct or aid the defective execution of such statutory powers." The case of *Wannall v. Kem*, 51 Mo. 150, is referred to as sustaining this proposition. Whether an officer taking the acknowledgment may, during his continuance in office, voluntarily correct his certificate was not a question in the case, and the statement must be regarded in the nature of a *dictum* of the court. If, however, the principle is correct, and sustained by authority, and is applicable, it is decisive of the question under consideration.

By referring to the case of *Wannall v. Kem*, 51 Mo. 150, quoted, it will be seen that the court uses the precise language used by this court in the case of *Cox v. Holcomb*, 87 Ala. 591, 13 Am. St. Rep. 79, and just quoted. By examination, it will be seen the precise question was not before the court in the case of *Wannall v. Kem*, 51 Mo. 150. The bill was filed to foreclose a mortgage given by Kem and wife upon lands belonging to the wife. The bill admitted the insufficiency of the certificate of the notary public, made him a party defendant, and sought to have the certificate amended by the decree of the court. It was held that a court of equity had no jurisdiction to correct the mistake, and the bill was dismissed. In the opinion rendered it was stated: "The officer may volun-

tarily correct his certificate, when he has given a defective one, if the facts really exist to warrant such action." Several authorities are referred to in this opinion, but a careful examination shows that none of them sustain the court in its *dictum*. The authorities there cited are on the point that a court of equity has no jurisdiction to correct such mistakes.

Acting on the suggestion made by the court, the notary, who had continued in office, did afterwards perfect his certificate, and the question came up again, and is reported in *Wannall v. Kem*, 57 Mo. 478. On this trial, the facts of the amended certificate were controverted by Mrs. Kem, and the issue submitted to a jury. The precise question was presented in the sixth charge to the jury. The jury found the issue in favor of Mrs. Kem, and against the truth of the facts as stated in the new certificate. The issue having been determined in favor of Mrs. Kem, she did not appeal, but the plaintiff did appeal. Whether charge No. 6, which involved the question now considered, asserted a correct proposition was not before the court on appeal, and could not have been adjudicated; but the judgment of the lower court was affirmed, and in conclusion the court, Napton, J., made this significant statement: "We are satisfied the law in this case was stated to the jury in the most favorable form it could have been for the plaintiff,—in fact, more favorable than the adjudications authorize."

The case of *Gilbraith v. Gallivan*, 78 Mo. 456, was one in which the officer who took the acknowledgment, and made the certificate after he had gone out of office, undertook to correct a defect in his certificate. The opinion rendered discussed the cases reported in 51 Missouri and 57 Missouri; and the court declared the statement that "the officer may voluntarily correct his certificate, or make out a proper certificate, where he has given a defective one," was made without citing authority, or reason, and was "fairly an *obiter dictum*." Further commenting on these two cases (51 Missouri and 57 Missouri), the court uses the following language: "These cases furnish the only foundation in this state for the doctrine that an officer, even while yet an officer, may amend his certificate of acknowledgment to the deed of a married woman for her fee-simple lands, after he has delivered it to the grantees with a defective certificate. It is not difficult to perceive that the doctrine rests upon a slim foundation, so far as direct adjudication is concerned,

when so eminent a jurist as Judge Napton could only speak of it as having been intimated by the court. Counsel for the respondent have been unable to furnish us any other authority on the subject, and we presume they are possessed of no more."

The case in 51 Missouri has been discussed at length because it was referred to in *Cox v. Holcomb*, 87 Ala. 591, 13 Am. St. Rep. 79. After a careful examination, we hold it is not an authority in point, and it has been expressly declared an *obiter dictum* by the later decisions of the same state.

In the case of *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516, it was held that the officer could amend his certificate, and to support the proposition the case of *Elliott v. Peirsol*, 1 Pet. 328, was cited. An examination of this case discloses the fact that it does not sustain the proposition. The case in 1 Peters arose under the construction of a Kentucky statute, and in construing the statute the court says: "The Kentucky statute above cited shows clearly that the legislature of that state has never lost sight of the principle declared by the Virginia statute, 'that when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding on the *feme* and her heirs.' What the law requires to be done and appear of record can only be done and made to appear by the record itself. It is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*." The court then proceeds as follows: "Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of opinion he had not. We are of opinion he acted ministerially, and not judicially, in the matter; and until his certificate was recorded, it was in its nature but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record the certificate of the acknowledgment of a deed was *functus officio* as soon as the record was made. If a clerk may, after a deed, together with the acknowledgment or probate thereof, has been committed to record, under color of amendment, add anything to the record of acknowledgment, we can see no just reason why he may not subtract from it. . . . Such a doctrine would be, in practice, of very dangerous consequences to the land titles of the country, and cannot receive the sanction of this court."

The reasoning and conclusion of the court in this case excludes it as an authority to sustain the proposition declared in the Indiana case, that the officer before whom an acknowledgment is made may voluntarily alter or amend his certificate at any time during his continuance in office. It is to the reverse. See also *Murrell v. Diggs*, 84 Va. 900; 10 Am. St. Rep. 893.

In the case of *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779, it was held that the certificate of a notary public to a deed is not an act *in pais* which he may exercise by virtue of his office at any time while in office; that he "derives his power from the statutes, acts under a special commission for that particular case, and after taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority, and cannot alter or amend his certificate." Mr. Justice Baldwin, who delivered the opinion, thus referred to the case of *Jordan v. Corey*, 2 Ind. 385, 62 Am. Dec. 516, which we have above considered: "We do not deem it necessary to criticise the case of *Jordan v. Corey*, 2 Ind. 385; 52 Am. Dec. 516. That case we think wholly unsupported by authority." The case in 11 California is directly in point, and the reasoning of the court appears to us to be conclusive.

In the case of *Merritt v. Yates*, 71 Ill. 638, 22 Am. Rep. 128, Walker, J., delivering the opinion of the court, said: "It is also contended that the subsequent certificate, written by the justice of the peace on the deed some years after the first was made, cured the defective certificate, although the deed was not acknowledged. We have been referred to no precedent for such action, and we would confidently expect none can be found. Anciently, such acknowledgments could only be taken in open court, and entered on the records of the court in proceedings tedious, expensive, and encumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskilled persons, and the title to property held by married women was guarded with such care as only to permit it to be divested by the judgment of a court of record. Justices of the peace, and the other enumerated officers, have, however, under our laws, been intrusted with the power to take and certify such acknowledgments; and when in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by the judgment of a court of record." The precise

question was decided here, and it was held a justice of the peace could not cure any defect in his first certificate at a subsequent time, unless the parties to the deed reacknowledged it.

The case of *Harmon v. Magee*, 57 Miss. 414, declares: "The acknowledgment of a married woman is an essential part of a conveyance executed by her. If wanting, it cannot be supplied; if defective, it cannot be amended; if properly authenticated, it cannot be gainsaid nor questioned, save for fraud. The officer who takes it performs a judicial act in determining whether it was acknowledged in the mode and manner required by law; and he is required by his certificate to authenticate the judicial conclusion to which he has arrived." Although in this case the court held that the officer might, at any time after the acknowledgment, while in office make up the record, yet, having once made it, it could not be altered. The facts stated in the opinion of the court show that the married woman reappeared before the officer, and admitted the acknowledgment, when the last certificate was made.

Several of the states have statutes providing the manner in which defective certificates of acknowledgments to deeds of conveyance may be remedied. We have none in Alabama. Many authorities are cited in the American and English Encyclopædia of Law, 150, and in the note to *Jordan v. Corey*, 52 Am. Dec. 522; and upon investigation we find the great weight of authority and reason in support of the propositions, that the power conferred on certain officers to take acknowledgments to deeds of conveyance is statutory, and courts of law or equity have no jurisdiction to amend or correct defective executions of the power; that the acknowledgment and certificate are essential parts of the conveyance; that the officer before whom the acknowledgment is made, and who is required to make the certificate, acts judicially when certifying to the acknowledgment made before him; and when delivered to the parties, and accepted for record, or as the complete execution of the instrument, he has no power to alter, add to, or make a new certificate, without a reacknowledgment. It is not necessary to determine the effect of such reacknowledgment, and new or amended certificate as to such reacknowledgment, further than has already been declared by this court in numerous decisions.

These conclusions accord with principles declared in many cases in our court, and with our own statute: Code, sec. 2508;

Scott v. Simmons, 70 Ala. 357; *Miller v. Marz*, 55 Ala. 338, 339; *Cox v. Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79; *Rogers v. Adams*, 66 Ala. 600; *Cahall v. Citizens' Mut. Building etc. Ass'n*, 61 Ala. 232; *Sharpe v. Orme*, 61 Ala. 263. They may work a hardship in some cases, but they afford a much safer protection to titles than to leave such important interests to the voluntary action and uncertain memory of the officers authorized by statute to take acknowledgments and make the certificates. If he can add to a certificate, why not abstract from it? If he can make a new certificate four years after the deed has been delivered and recorded, why not twenty years after, and perhaps after parties and witnesses have died? If courts of law and equity are powerless to inquire into and determine the correctness of these certificates, and change them in accordance with the real facts, it is difficult to perceive why such power should rest with the officer who made them. We hold that the second certificate was made without legal authority, and is invalid.

Reversed and remanded.

JUDGMENTS AGAINST INFANTS, VALIDITY OF. — A judgment should not be rendered against an infant in a civil action, unless he has a guardian, who may defend in his behalf: *Johnson v. Waterhouse*, 152 Mass. 585; 23 Am. St. Rep. 858, and note.

ACKNOWLEDGMENTS, POWER OF OFFICER TO AMEND OR CORRECT. — This question is discussed in a note to *Jordan v. Corey*, 52 Am. Dec. 520-522. In *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79, it was said: "The officer taking the acknowledgment may, during his continuance in office, voluntarily correct his certificate, or make a new one conforming to the statute, if the facts warrant." In *Ralston v. Moore*, 87 Ky. 571, where the clerk, in writing out the certificate to a mortgage which was acknowledged before his deputy, failed to state the facts and include the indorsement made upon the mortgage by such deputy, the court decided that the mistake was one which might properly be corrected. In Pennsylvania, by a provision of the statutes, the remedy for formal defects in certificates of acknowledgment to deeds and other written instruments is by a bill in equity: *Manufacturers' N. G. Co. v. Douglass*, 130 Pa. St. 283; *Cressona etc. Ass'n v. Sowers*, 134 Pa. St. 354. An officer who has taken an acknowledgment cannot contradict and falsify his own certificate: *Hochman v. McClanahan*, 87 Va. 22.

GEORGIA PACIFIC RAILWAY COMPANY v. LOVE.

[91 ALABAMA, 482.]

RAILROADS—PRESUMPTION OF NEGLIGENCE FROM ACCIDENT—BURDEN OF PROOF.—An injury to a passenger by a collision on a railroad train, while he is exercising that degree of care which may be reasonably expected of a person in his situation, raises a presumption of negligence against the railroad company, and casts upon it the burden of rebutting the presumption of showing that diligence and a careful observance of duty on its part could not have prevented the injury.

ACTION against the appellant corporation to recover damages for an injury received by the appellee while traveling as a passenger on appellant's railroad, in a passenger-caboose attached to a freight train. At the time that the injury was received, the train had stopped to take on a freight-car. The engine was run back, and when it brought up such car, the latter struck the caboose with such force that the appellee was thrown to the floor, receiving the injuries complained of. The flagman on the train testified that the cars came together with no more force than was usual in making connections between freight-cars; that he requested the passengers in the caboose to sit down just before the train struck it, and that the appellee remained standing at that time. The appellee and another passenger testified that they did not hear the flagman make this request. The jury were instructed that "if the jury believe from the evidence that the plaintiff was a passenger on defendant's train, and was injured while such passenger, as alleged in the complaint, the law presumes, in the absence of all explanation, that the injury was caused by the negligence of the defendant, and casts upon the defendant the burden of overturning that presumption, or of showing by the evidence that diligence and a careful observance of duty could not have prevented the injury." The appellant excepted to this charge.

James Weatherly, for the appellant.

Hewitt, Walker, and Porter, for the appellee.

STONE, C. J. In *Louisville etc. R. R. Co. v. Jones*, 88 Ala. 876, a case of alleged personal injury to a passenger, we said: "If injury is suffered at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption, or of showing that diligence and a careful observance of duty could not have prevented

the injury." In that case the coach in which plaintiff's intestate was being carried was derailed, and thrown from the track, the derailment being caused either by one of the wheels becoming loose on the axle, or by the sinking of a cross-tie, and consequent depression of the track at that point. If the derailment was caused in either of these ways, it resulted from imperfection or derangement of the machinery or plant; and in such cases the rule of *prima facie* negligence applies: Hutchinson on Carriers, secs. 800, 801; Railway Accident Law, sec. 375. The case of *South & N. R. R. Co. v. Bees*, 82 Ala. 340, was for an injury to stock; and the same rule of presumed negligence applies in cases of that class.

The extract copied above from *Louisville etc. R. R. Co. v. Jones*, 88 Ala. 376, although correct in that case, and in many others, is not of universal application: See Hutchinson on Carriers, secs. 799-801; Railway Accident Law, sec. 376. The principle is perhaps stated too broadly.

Railroad Co. v. Pollard, 22 Wall. 341, was very like the present one in its facts. In that case the trial court had charged the jury "that while the plaintiff was bound to satisfy the jury that the injury was caused by the negligence of defendant, if from the evidence the jury were satisfied that the injury was occasioned while Mrs. Pollard was a passenger on defendant's road, and that she was in the exercise of ordinary care, namely, that degree of care which may be reasonably expected from a person in her situation, this would be *prima facie* or presumptive evidence of the defendant's liability, and that the plaintiff would not be required to show by what particular acts of misconduct or negligence on the part of the defendant the injury was occasioned." The case was affirmed, Waite, C. J., delivering the opinion, and holding there was no error in the charge we have copied. So in the case of *Dougherty v. Missouri R. R. Co.*, 81 Mo. 325, 51 Am. Rep. 239, — also a case much like this, — a similar doctrine was announced. The court said "that where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, 'and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care,' it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

It may be that the charge given had a tendency to mislead the jury; and it may be that some explanation, if asked,

should have been given. We cannot know it was not given. The charge excepted to expresses a correct general proposition, and we cannot assume that it misled the jury. The city court did not err in the charge given and excepted to.

There is nothing in the other questions.

Affirmed.

RAILROADS — NEGLIGENCE — BURDEN OF PROOF. — The occurrence of an accident to a passenger is *prima facie* evidence of negligence on the part of the carrier, throwing upon it the *onus* of rebutting the presumption by proof that there was no negligence: *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and note discussing accidents as evidence of negligence. See also *Birmingham etc. R'y Co. v. Hale*, 90 Ala. 8; ante, p. 748, and note.

SMITH v. WESTERN RAILWAY OF ALABAMA.

[91 ALABAMA, 452.]

COMMON CARRIER — LIABILITY FOR LOSS BY UNPRECEDENTED FLOOD. — A common carrier is not liable for injury to goods in his possession, caused by an unprecedented flood in a river, and coming on so suddenly that it could not be anticipated by human knowledge or foresight, nor the injury prevented by the exercise of reasonable diligence.

A. and R. B. Barnes, for the appellants.

Harrison and Ligon, for the appellee.

COLEMAN, J. The action is to recover damages for an injury to goods, alleged to have been caused by the fault or negligence of the defendant as a common carrier. The principal defense relied on is, that the damage resulted from an act of God, without the fault or negligence of defendant. All the authorities hold that a common carrier is not liable for injuries or damages caused by an act of God, if there is no fault or negligence on its part: 2 Am. & Eng. Ency. of Law, 746; 12 Am. & Eng. R. R. Cas. 183, and notes; 2 Am. & Eng. R. R. Cas. 166; *Railroad Co. v. Reeves*, 10 Wall. 176.

As stated in the case of the *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 452, 11 Am. St. Rep. 58, railroads "are not bound to provide against unusual or extraordinary floods, such as have never been known to occur previously, and which could not have reasonably been foreseen by competent and skilled persons." See also opinion of Stone, J., in case of *Coccos River S. B. Co. v. Barclay*, 30 Ala. 126.

An act of God is a cause which no human prudence or power could prevent or avert. While it is true that no human

agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence, may be foreseen and guarded against. When this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God. Notice of an extraordinary rise at the head of a river might be sufficient to parties engaged in business lower down to expect a proportionate rise, and to prepare for it, dependent more or less upon the suddenness of the rise, and the time after notice, and before the rising water reached the place where the injury occurred.

The car in which were appellants' goods, destined for Opelika, was stopped at West Point on account of a wash-out in the railroad, five miles west of West Point, on the route to Opelika, and while in the car the goods were damaged by an overflow of the river. The undisputed evidence is, that "it was the greatest overflow ever known in West Point; that the water rose thirty-seven inches higher than it ever rose before within the memory of man"; "that the water was never known before to rise high enough to get into the freight-cars standing on the side-track"; "that in this case the water covered the floors of the freight-cars to a depth of eighteen inches," and caused the damage complained of by plaintiffs.

No human power could have stayed the flood, or foresight or prudence anticipated such an overflow. It is contended that if the train had remained in Lagrange, Georgia, or the car had been run out on the main track, the goods would have escaped injury. It is no proof of negligence, that because after an injury has resulted it can then be seen how the injury might have been avoided. The question is, What notice or knowledge had the defendant, from which such an overflow could reasonably have been anticipated or foreseen? *Beatty v. Central Iowa R'y Co.*, 58 Iowa, 242. In this case the proof shows none.

Was there any fault or negligence on the part of defendant for not removing the goods to a safe place after it became reasonably known that the high water would reach the goods where stored in the cars? On Monday night the goods were left in the cars, to all human knowledge in a place of safety. On Tuesday morning the water had overflowed the entire

railroad track. It seems that the engineer and crew used all reasonable diligence, consistent with personal safety, after daylight, and information of the overflow, to procure a bateau in order to reach the car where the goods were stored. The engineer testifies that he tried to get up steam, but the water had entered the fire-box of the engine; that then all was done that could be done to save the goods, but without avail, the water continuing to rise in the cars to a depth of eighteen inches above the floors. There was no evidence introduced or offered to controvert this statement of the facts of the case.

Whether the court below erred in the admission or exclusion of testimony offered, or in the charges given or refused, the undisputed facts show that the defendant was entitled to the general charge in its favor: *Moody v. Walker*, 89 Ala. 619; *Stephens v. Regenstein*, 89 Ala. 561, 18 Am. St. Rep. 156.

Affirmed.

COMMON CARRIER — LIABILITY FOR LOSS OF GOODS BY FLOOD. — A carrier of goods will be excused for loss of goods caused by an unprecedented flood: *Nashville etc. R. R. Co. v. David*, 6 Heisk. 261; 19 Am. Rep. 594; note to *Norris v. Savannah etc. R'y Co.*, 11 Am. St. Rep. 365, discussing fully the subject of loss by flood.

LONG v. GEORGIA PACIFIC RAILWAY COMPANY.

[91 ALABAMA, 512.]

CORPORATIONS — ULTRA VIRES EXECUTORY CONTRACT. — While an ultra vires contract made with a corporation remains executory neither party to it is estopped from asserting its invalidity, nor can either enforce it against the other, even though the fruits of the contract have been received and enjoyed.

CORPORATIONS — ULTRA VIRES EXECUTED CONTRACT. — When an ultra vires contract made with a corporation has been fully executed by both parties, neither of them can assert its invalidity as a ground for relief against it.

Hewitt, Walker, and Porter, and Coleman and McIntyre, for the appellant.

James Weatherly, for the appellee.

McCLELLAN, J. The case made by the amended bill is this: On April 23, 1888, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Company a deed, upon valuable consideration presently paid, to and of the iron, coal, and oil interests and properties in and pertaining to certain tracts of land, aggregating about four

thousand acres, the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void because of this incapacity of the corporation, and to have the same canceled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

Only those grounds of error which present the question whether a vendor who has sold, received payment for, and conveyed land to a corporation which had no power to hold the same can have any relief in respect to the transaction are discussed in argument, and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well-settled law that a party to an *ultra vires* executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself: *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 88 Ala. 115; 3 Am. St. Rep. 695; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But where the contract is fully executed, — where whatever was contracted to be done on either hand has been done, — a different rule prevails. In such case the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties' voluntarily doing of what they have unlawfully agreed places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other what was parted with. The reason for which is, that since they are equally in fault, the law will help neither": Bishop on Contracts, sec. 627.

The former decisions of this court are in line with this doc-

trine, and fully recognize the distinction between executory and executed void contracts, to the effect that while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter: *Morris v. Hall*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 83 Ala. 115; 3 Am. St. Rep. 695; *Dudley v. Collier*, 87 Ala. 481; 18 Am. St. Rep. 55; *Craddock v. American etc. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts: *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. Spiral S. B. Co.*, 57 Mich. 146; 58 Am. Rep. 852; *Parish v. Wheeler*, 22 N. Y. 494; *Miners' Ditch Co. v. Zellerbach*, 87 Cal. 548, 606; 99 Am. Dec. 30; *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well-established principle. It is, that when a party sells and conveys property to a corporation which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the state, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found: *Rutland etc. R. R. Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & R. 818; *Goundie v. Northampton Water Co.*, 7 Pa. St. 238; *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Lathrop v. Commercial Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 78 Ill. 23; 24 Am. Rep. 230; *Cowell v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordsville etc. Bank*, 112 U. S. 405, 418; 2 Morawetz on Private Corporations, sec. 710.

The decree of the chancellor is affirmed; and the same re-

sult is reached in the case of B. L. Jones and B. B. Long v. Georgia Pacific Railway Company, submitted with this case, and involving the same question.

Affirmed.

CORPORATIONS — CONTRACTS — ULTRA VIRES. — A contract *ultra vires*, while it remains executory, cannot be enforced, but when it has been executed, the corporation is estopped to deny its validity: *Sherman etc. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note; as to the effect of the plea of *ultra vires* in the case of executory contracts, see *Jenison v. Olmsted etc. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482, and note.

NEWSOME v. SNOW.

[91 ALABAMA, 661.]

VENDOR AND VENDEE — ADVERSE POSSESSION BY VENDEE WITHOUT DEED.—

A vendee in possession of land under a contract to purchase, whether oral or written, who has paid the entire purchase-money, holds adverse possession as against his vendor from the time that such payment was made; nor is his possession prevented from being adverse by his knowledge of a defect in his title, or his subsequent demands for a deed.

EJECTMENT by C. Snow and three of his sisters, children of Dudley Snow, deceased. S. L. Newsome intervened as the landlord of the tenant in possession, and pleaded the statute of limitations. Judgment for the plaintiffs, and Newsome appealed.

Matthews and Whiteside, for the appellant.

Kelly and Smith, for the appellee.

CLOPTON, J. The conclusions of fact from the evidence are, that the lot of land sued for was the property of Dudley Snow, the ancestor of the plaintiffs, at the time of his death. Henry Snow, who was co-heir and tenant in common with the plaintiffs, acting as their agent, but without written authority, sold the lot in the spring of 1876 to J. M. Hays, the vendor of the defendant. At the time of the contract of sale, Hays paid the purchase-money and entered into possession under the contract, and he continued in possession, exercising acts of ownership, claiming it as his own, until 1888, when he sold the lot to defendant, who entered and continued in possession to the commencement of the suit. Defendant and Hays, under whom he claims, were in the open, notorious, and continuous adverse possession for the length of time requisite to bar

plaintiffs' right of entry, if there was no recognition of or subordination to their legal estate.

Plaintiffs insist, however, that the repeated requests of Hays and defendant that the heirs of Dudley Snow should execute a deed to the lot of land was a recognition of their title, operating to defeat the adverse character of the possession. The evidence does not disclose that there was a written contract of sale and purchase between Henry Snow and Hays. In the absence of such proof, we shall presume that it was oral. In either case, the purchase-money having been paid, the character of the possession is the same. It is well settled that when the vendee has complied with the terms of the contract on his part by paying the purchase-money, and is entitled to the legal title, whether the contract be in writing or by parol, having discharged all pecuniary duty to the vendor, he has a perfect equity, and his possession in pursuance of such sale and purchase is presumed to be antagonistic, and if continuous for the statutory period, will bar the vendor's right of entry or of action, which presumption may be rebutted or overcome by showing recognition of the vendor's right of entry or a subordination to his legal estate: *Potts v. Coleman*, 67 Ala. 221; *Tillman v. Spann*, 68 Ala. 102.

It is true that Hays testifies that at the time he bought the lot he understood that it belonged to the heirs of Dudley Snow. It is not essential that defendant's claim of right or title should be good, or believed to be good. Knowledge that his title is defective does not prevent his possession from being adverse, if the other essential elements exist. It is sufficient that there is a *bona fide* purpose to assert and rely upon his possession and claim of right, as hostile or adverse to that of the real owner: *Bernstein v. Humes*, 75 Ala. 241; *Manly v. Turnipseed*, 37 Ala. 522; *Alexander v. Wheeler*, 69 Ala. 332. Actual claim of ownership, not the *bona fides* or strength of the claim, is the test or element of adverse possession: *Smith v. Roberts*, 62 Ala. 83. The expression "good faith, claiming title," found in many of the decisions, must not be understood to involve an inquiry as to the defendant's belief in the strength of his title, or to mean that, to constitute his possession adverse, he must claim in good faith to have the real title, as counsel seem to suppose, before the bar of the statute is complete. Good faith in claiming possession and right of ownership — the real intention to claim possession as his own, distinct from and hostile to the possession and title of the true

owner, and to claim title — is the test or element of adverse possession in this respect: *Dothard v. Denson*, 72 Ala. 541. Mere knowledge of Hays and the defendant that the legal title or estate was in plaintiffs is not such recognition or subordination as will prevent their possession from being adverse.

It may be that negotiations for a purchase by a person in possession, and before the bar is complete, will be regarded as evidence that his possession is permissive, and not under a claim of right. Neither Hays nor the defendant entered into negotiations for a purchase of the lot after the original contract of sale was made and Hays put into possession thereunder. Henry Snow, for himself, and as the agent of the other heirs, sold the entire interest or estate to Hays, whose possession, as we have shown above, became adverse from and at the time of the payment of the purchase-money. His subsequent requests of Henry Snow that he should obtain a deed from the heirs were not negotiations for a new and distinct purchase, but simply to quiet his title, his possession not having ripened into a title under the statute of limitations, — mere requests that the original contract of sale and purchase should be consummated by the plaintiffs. Such requests may be considered as admissions that, when they were made, the legal title or estate was in the plaintiffs, but do not show that he did not claim the possession as his own under the contract of sale and purchase, distinct from and hostile to the possession and title of plaintiffs. If the plaintiffs had executed to Hays a bond conditioned to make title on the payment of the purchase-money, and he became entitled to a legal conveyance by the payment of the purchase-money, it cannot be contended that a mere demand of such conveyance is a recognition of or subordination to the legal estate of his vendors sufficient to show that his possession was permissive, and not under a claim of right. If in such case he had remained in possession, claiming the land as his own, for the period prescribed by the statute of limitations, the vendor's title would be barred, notwithstanding he may have in the mean time demanded a conveyance in accordance with the terms of the bond: *Ormond v. Martin*, 37 Ala. 598. Henry Snow, acting as agent, having sold to Hays the entire interest or estate, including that of plaintiffs, and Hays having paid the purchase-money and been put into possession, and he and defendant, his vendee, having remained in the open,

notorious, and continuous possession, claiming the land as their own, with the intention to claim title, for the period prescribed by the statute of limitations, and the plaintiffs, with knowledge of the sale, having acquiesced in such possession and claim of ownership, the adverse possession of Hays and defendant has ripened into a perfect and indefeasible title: *Barclay v. Smith*, 66 Ala. 280.

The judgment of the city court is reversed, and judgment is here rendered for defendant.

VENDOR AND VENDEE — ADVERSE POSSESSION. — Possession under a bond for a deed or a contract of purchase is not adverse to the vendor: *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433; *Browning v. Bates*, 3 Tex. 462; 49 Am. Dec. 760; *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; until full payment of purchase-money has been made according to the terms of the agreement: *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; *Dean v. Brown*, 23 Md. 11; 37 Am. Dec. 555; *East Tenn. etc. R'y Co. v. Davis*, 91 Ala. 615.

Possession taken under a contract of purchase cannot be adverse as against the vendor, unless its hostility is manifested by unequivocal acts brought expressly to the knowledge of the vendor, or of such a character as to charge him with such knowledge: *Kerns v. Dean*, 77 Cal. 555. In *Ketchum v. Sparlock*, 34 W. Va. 597, it was decided that where a person is in possession of land, claiming right thereto under an executory agreement for the purchase thereof, his possession is presumptively adverse to all persons except his vendor.

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MAKER OF AN ABSTRACT OF TITLE TO REAL PROPERTY, guaranteed by him to be correct, is answerable in damages to the purchaser of such property, who relied upon the abstract, and refused to purchase without it, if recorded conveyances are omitted therefrom to his injury, though the abstract was made at the request and expense of and delivered to the owner of the property, who thereupon delivered it to the intending purchaser for examination. *Dickle v. Abstract Co.*, 616.

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2. POWER OF OFFICER TO CORRECT. — Where the certificate of acknowledgment of a mortgage of a homestead by a husband and wife is fatally defective, the officer making the certificate has no power to correct it at a subsequent time, nor to attach thereto a new and valid certificate. *Griffith v. Ventress*, 918.
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owner for the value of the horse, in an action of trespass on the case; and the fact that the contract for the pasturage is void because made on Sunday constitutes no defense. *Costello v. Ten Eyck*, 123.

ANTENUPTIAL CONTRACTS.

See HUSBAND AND WIFE, 1.

APPEAL.

1. **INFERIOR COURTS — LIABILITY FOR JUDICIAL ERRORS.** — Inferior tribunals have a right to exercise their honest judgment in passing upon all questions presented to them; and when they have so exercised it, they are exempt from civil liability for errors, although such errors result in depriving the citizen temporarily of his liberty. His only remedy is by appeal. *Brooks v. Mangan*, 137.
2. **APPEAL FROM A FINAL DECREE IN CHANCERY BRINGS UP THE WHOLE CASE FOR REVIEW**, with all interlocutory orders involving the merits of the controversy. *Pennington v. Todd*, 419.
3. **THE APPELLATE COURT CANNOT REVIEW THE EVIDENCE** in the transcript on appeal, for the purpose of finding the facts and ordering judgment to be entered accordingly. *Barden v. Montana Club*, 27.
4. **ABSTRACT INSTRUCTIONS.** — The giving of abstract instructions is not reversible error, unless the record shows that their effect was to mislead the jury to the appellant's injury. *Bancroft v. Otis*, 904.
5. **MISLEADING INSTRUCTIONS.** — The giving of misleading instructions is not reversible error, when such instructions might have been, but were not, met and remedied by requests for explanatory instructions. *Bancroft v. Otis*, 904.
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7. **ERROR WITHOUT INJURY IN EXCLUSION OF EVIDENCE.** — When evidence is erroneously excluded, the rule of error without injury cannot be invoked, on the ground that the ruling was made after all the evidence on that point had been adduced, and that the evidence was insufficient. *Roach v. Privett*, 819.
8. **AN INSTRUCTION THAT AN HABITUAL DRUNKARD** "means more than being drunk on two or three occasions within a given time, — two or three times within a given number of months; that it means the use of intoxicating liquors to such an extent as to in some manner disqualify a man from pursuing his avocation; but you can perhaps define it as well as the court," — does not entitle the losing party to a reversal on the ground that this last clause left it to the jury to define for themselves the words "habitual drunkard." *Rude v. Nass*, 717.
9. **INSTRUCTION TO A JURY**, that if they find plaintiff is not guilty of any want of ordinary care which contributed directly towards his injury he is entitled to recover, does not entitle the defendant to a reversal, if the judge had, in other instructions, gone fully over every question involved in the case, and stated all the conditions of the plaintiff's recovery or defeat. *Johnson v. First Nat. Bank*, 722.
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§1. AFFIRMANCE OF AN INTERLOCUTORY DECREE ON APPEAL CANNOT be construed as an affirmance as to errors of which the appellants had no cause of complaint, and therefore another party prejudiced by those errors may prosecute a subsequent appeal based thereon. *Pennington v. Todd*, 419.

§2. CRIMINAL LAW — JUDGMENT WITHOUT PLEA IS REVERSIBLE ERROR. — There can be no trial on the merits nor a conviction in a criminal case until the accused has pleaded not guilty, or this plea has been entered for him by the court. If the record fails to show that such plea has been made or entered, the judgment will be reversed. *Jackson v. State*, 880.

See HABEAS CORPUS, 1, 2; TRIAL.

ARBITRATION.

See INSURANCE, 4-7; LIMITATIONS OF ACTIONS, 6.

ARREST.

1. BREACH OF PEACE — ARREST WITHOUT WARRANT. — To authorize arrest without warrant for a breach of the peace, the offense must be committed in the presence of the officer, and the arrest made immediate. An arrest for such offense committed out of the officer's sight, and made upon information received from a third person, is unauthorized. *People v. Johnson*, 116.

2. BREACH OF PEACE. — To be intoxicated and yelling on the public streets of a village, in such manner as to disturb its good order and tranquillity, is an act of open violence and a breach of the peace, which, if committed in the presence of an officer, will justify arrest without warrant. *People v. Johnson*, 116.

See JUSTICES OF THE PEACE, 1.

ASSAULT.

1. ASSAULT TO RAPE. — ACTUAL VIOLENCE, OR TOUCHING THE PERSON of the one assaulted, is not essential to the crime of assault to rape. If the intent, with the present means of carrying it into effect, exists, and preparation therefor has been made, the crime is complete. *State v. Shroyer*, 344.

2. ASSAULT TO RAPE. — In order to constitute the crime of an assault with intent to rape, it is immaterial whether or not the sexual connection was accomplished by actual physical force to the intended victim, or while she was asleep. *State v. Shroyer*, 344.

3. ASSAULT TO RAPE — EVIDENCE OF REPUTATION FOR VIRTUE AND CHASTITY. — In discrediting a witness, the inquiry may extend to his general character for virtue, sobriety, and chastity. This rule applies to one testifying on his trial for an assault with intent to commit rape. *State v. Shroyer*, 344.

4. ASSAULT WITH INTENT TO RAPE. — On a trial for an assault with intent to rape, the evidence, to be sufficient to convict, must show such acts and conduct of the accused as leave no reasonable doubt of his intention to gratify his lustful desire, against the consent of the female, notwithstanding resistance on her part. Hence evidence that the accused put his hands lightly on the woman's shoulders, following her silently about sixty feet, making no threats or effort to stop her, nor attempting any

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coercion, nor to put her in terror, and that he ran away without attempting to detain her when she screamed, upon his making known to her his desire to have sexual intercourse, will not justify a conviction of assault with intent to rape, although it will justify a conviction for assault and battery. *Jones v. State*, 850.

ASSIGNMENT.

See **BILLS AND NOTES**, 13, 25.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See **CORPORATIONS**, 41; **PARTNERSHIP**, 1.

ASSOCIATIONS.

See **BENEVOLENT SOCIETIES**.

ASSUMPSIT.

See **ABATEMENT**, 3.

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1. **LIABILITY OF COUNTY TO GARNISHMENT.** — A county is liable to garnishment for a debt due by it to its officer, under a statute declaring that all persons are subject to garnishment, that the word "person" may be applied to "bodies politic and corporate," and that counties are such bodies. *Waterbury v. Board of Commissioners*, 67.
2. **GARNISHMENT OF COUNTY.** — Public policy does not require that counties should be exempted from garnishment when, instead of being exempted by statute, their liability to the process is within the law. *Waterbury v. Board of Commissioners*, 67.
3. **INSOLVENT MERCHANT NOT LIABLE TO ATTACHMENT FOR SHIPPING COTTON OUT OF STATE WHEN.** — An insolvent merchant residing in Mississippi does not subject himself to attachment by shipping to his commission merchant in another state cotton to be there sold, and the proceeds applied to the payment of a debt due to the latter, where the debt exceeds the value of the cotton so shipped. *Lowenstein v. Ben*, 262.
4. **ATTACHMENT LEVIED ON PROPERTY OF STRANGER — RIGHT OF THE LATTER TO RETAKE AND RETAIN POSSESSION.** — If, after a writ has been levied on the property of a stranger thereto, he quietly and peaceably repossesses himself of it, he may retain it; and the officer who levied the writ is not justified in using forcible means to regain possession, and if he does so, is liable to an action. Should he wish to test the right of the owner, his remedy is to bring an action for that purpose. *Brownell v. Durkee*, 743.
5. **PRIORITY BETWEEN ATTACHMENTS AND UNRECORDED CONVEYANCES.** — Until a sale has been made under a judgment or attachment, the lien acquired by it is subject to all prior unrecorded deeds and equities existing against the land. The lien of an attachment or judgment does not extend beyond the actual interest of the debtor at the time of the rendition of the judgment or the levy of the attachment. *Hope v. Blair*, 366.
6. **ATTACHMENT IS NOT DISSOLVED BY THE DEATH OF ONE OF THE DEFENDANTS,** if the action is revived and prosecuted to judgment in the manner provided by law. *Van Kleeck v. Hammell*, 182.

ATTORNEY AND CLIENT.

KNOWLEDGE OF ATTORNEY, WHEN NOT NOTICE TO CLIENT. — One who employs an attorney for the special purpose of examining an abstract of title to property and giving an opinion thereon is not chargeable with knowledge of the attorney, acquired in another transaction, of the pendency of a suit which may affect the title to such property. *Trentor v. Potchen*, 225.

ATTORNEY'S FEES.

See **BILLS AND NOTES**, 6; **COSTS**; **COVENANT**, 1.

BAILMENT.

1. **BURDEN OF PROOF, AS BETWEEN BAILOR AND BAILEE, IS AS FOLLOWS:**
The bailor must prove the contract of bailment and the delivery of the goods; then the bailee, if he wishes to exonerate himself from liability for their loss, must show the fact and manner of loss; and the bailor must assume the burden of establishing that the loss, though by fire, was due to the negligence of the bailee. *Lancaster Mills v. Merchants' etc. Co.*, 586.
2. **A GRATUITOUS BAILEE OF A CERTIFICATE OF STOCK IS LIABLE FOR ITS CONVERSION**, if he, without authority from its owner, delivers it to the officers of a corporation, who cancel it and issue a new certificate to another person, though such delivery may have been occasioned by a forged order, and the bailee acted in good faith. *Hubbell v. Blandy*, 154.
3. **BAILEE CONVERTING PROPERTY IS ANSWERABLE THEREFOR, NO MATTER HOW GOOD HIS INTENTIONS, OR HOW CAREFUL HE HAS BEEN.** *Hubbell v. Blandy*, 154.
4. **VOID CONTRACT.** — Where one, in the absence of any contract, becomes a bailee and liable for the safe return of the property by retaining the possession, the fact that he took possession under a void contract is no defense. *Costello v. Ten Eyck*, 128.

See **NEGLIGENCE**, 6; **TROVER**, 7; **WAREHOUSEMEN**.

BANKS AND BANKING.

1. **BOND OF CASHIER OF BANK COVERS WHOLE PERIOD OF HIS SERVICE, WHEN.** — Where the cashier of a bank gives to it an official bond, reciting his election as cashier, and conditioned that if he "shall, for and during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position, or whether under its present organization or charter, or under any renewals or extension thereof, discharge and fulfill with integrity and fidelity the trust thereby reposed in him, and faithfully and honestly execute the duties that may be assigned him, then the above obligation to be void, or else to be and remain in full force and virtue," such bond will protect the bank during the whole time of his service as cashier, and during the existence of the bank, notwithstanding the law required the cashier of the bank to be elected annually, and no formal election was had from year to year. And the executrix of a surety on such bond is liable for a breach thereof, although such breach occurred after the death of the surety, and after the bank had notice of his death. The

continuous service of the cashier, beginning in a formal election, and extended by mutual consent with the acquiescence of all parties interested, is sufficient to fix the liability of the surety on his bond. *Shackamaxon Bank v. Yard*, 521.

2. **THE CASHIER OF A BANK IS BOUND TO EXERCISE REASONABLE SKILL, CARE, AND DILIGENCE** in the discharge of his duties. If intrusted with the duty of making loan, he is not liable as a guarantor of the solvency of his transaction, nor responsible for an error of judgment, where he has exercised reasonable skill, diligence, and prudence. *Wallace v. Lincoln Sav. Bank*, 625.
3. **BANK DIRECTORS ARE NOT EXPECTED** to give their whole time and attention to the business of the corporation. The active management may be left to the cashier and other agents selected by the directors, whose duty in respect to such cashier and agents is to supervise, direct, and control them. *Wallace v. Lincoln Sav. Bank*, 625.
4. **DIRECTORS OF A BANK ARE NOT HELD TO BE LIABLE FOR OVERDRAFTS BY CUSTOMERS** who are people of character and of business integrity, though not having property from which payment could be coerced, where such overdrafts are not shown to have been authorized by the directors, nor are they shown to have had any actual knowledge thereof, though the facts of such overdrafts could have been ascertained from an examination of the entries upon the books of the bank. *Wallace v. Lincoln Sav. Bank*, 625.
5. **DIRECTORS OF A BANK ARE NOT TO BE HELD LIABLE FOR** promissory notes on the ground that they had been permitted to become barred by the statute of limitations, unless it appears that they were solvent assets, and that an injury resulted from the failure to bring an action thereon within the period allowed by such statute. *Wallace v. Lincoln Sav. Bank*, 625.
6. **OVERDRAFTS. — IT IS NOT NECESSARILY NEGLIGENT**, in the absence of a by-law or an order of a superior officer, for a cashier to pay the overdraft of a responsible customer; and therefore directors of the bank cannot be held liable by the mere proof that the account was overdrawn, and a loss sustained thereby. *Wallace v. Lincoln Sav. Bank*, 625.
7. **LIABILITY OF, FOR BILLS TRANSMITTED TO AN AGENT FOR COLLECTION. —** A bank receiving a bill for collection, payable at a distant point, and which must therefore be transmitted to that point for collection, is thereby impliedly instructed to send it to a suitable agent at the place of payment for collection, and such agent, when selected by it, becomes the agent of the owner, for whose negligence the bank cannot be held answerable. *Bank v. Cummings*, 618.
8. **BANK RECEIVING DRAFT OR CHECK IN PAYMENT, WHAT IS NOT. —** If drafts are received by a bank, after which the sender authorizes the bank to fill up a check for the amount of such drafts, and the bank thereupon stamps them as paid, and credits their amount to the account of a depositor, and sends the drafts and the check to its correspondent, with instructions to surrender the drafts on payment of the check, and thereupon the check is dishonored, and both it and the drafts are returned to the bank, it has a right to charge back to such depositor the amount with which he was so credited, because the bank cannot be regarded as having received the drafts in payment. *Bank v. Cummings*, 618.

See **BILLS AND NOTES**, 26; **BILLS OF LADING**, 2.

BENEVOLENT SOCIETIES.

1. **THE DECISION OF THE TRIBUNALS OF A BENEFIT ASSOCIATION** upon the rights of persons presenting death claims may be made final by the laws of such association, and if so made, the courts will not interfere with nor review such decision, there being no claim that the tribunals of the association acted fraudulently, or in any manner contrary to its laws. *Canfield v. Great Camp*, 186.
2. **DEFINITION OF THE WORDS "RELATED TO."** — If a statute permits a beneficiary member of a society to designate a person "related to and dependent upon" him, who shall be entitled, under certain conditions, to draw from the society a sum named, a relative by affinity, if selected by the member, is entitled to draw such sum. *Bennett v. Van Riper*, 416.

BILLS AND NOTES.

1. **CONSIDERATION, PROMISSORY NOTE, WHETHER NEGOTIABLE OR NOT, IMPORTS.** — A promissory note, whether it is negotiable or not, imports a consideration. It is not necessary, therefore, to express a consideration therein, nor is it necessary, in an action thereon, to allege or prove a consideration. The burden of showing a want of consideration is upon the defendant. *Carnwright v. Gray*, 424.
2. **PROMISSORY NOTE PAYABLE AFTER DEATH OF MAKER IS VALID INSTRUMENT.** — A promissory note, although by its terms payable after the death of the maker, is a valid instrument, where it contains a promise to pay a sum certain at a specified time after his death. *Carnwright v. Gray*, 424.
3. **CONTINGENCY NOT DESTROYING NEGOTIABILITY.** — A stipulation in a promissory note to pay costs of collecting, if not paid at maturity, does not destroy its negotiability. *Montgomery v. Crossthwait*, 832.
4. **EVIDENCE.** — In an action against the indorser of a note, who alleges a material alteration in the maker's signature, made after indorsement, evidence by the holder that on presenting the note to the indorser on or about maturity, the latter examined it thoroughly before indorsing on it a waiver of protest and notice thereof, is admissible. *Montgomery v. Crossthwait*, 832.
5. **ALTERATION — ESTOPPEL AGAINST INDORSER.** — Where a payee indorses a note before it is signed, and delivers it to the maker to sign, so as to enable him to obtain money for their joint benefit, he is estopped from denying the authority of the maker to sign it in the name of a partnership of which he is a member. *Montgomery v. Crossthwait*, 832.
6. **STIPULATION IN NOTE FOR COSTS INCLUDES ATTORNEY'S FEE.** — A stipulation in a note to pay all costs of collecting, not less than ten per cent, will include a reasonable attorney's fee as well as court costs. *Montgomery v. Crossthwait*, 832.
7. **ALTERATION — ADDITION OF "& Co."** — The addition of "& Co." to his signature, by the maker of a promissory note, without the knowledge or consent of the indorser, will discharge him, although such addition was made without authority from the partnership. *Montgomery v. Crossthwait*, 832.
8. **ALTERATION — WAIVER OF DISCHARGE.** — Where the indorser, with full knowledge of the alteration of the note, indorses and signs a waiver of protest and notice thereof on the note, and promises to pay the same, he thereby waives the discharge otherwise resulting from the altera-

- tion, and ratifies it, although the waiver is made without any new consideration. *Montgomery v. Crosthwait*, 832.
9. **ALTERATION — BURDEN OF PROOF.** — When the instrument sued on does not bear on its face any evidence of alteration, the burden of proving that it has been altered, after indorsement, is upon the indorser or party relying on that fact to defeat a recovery. *Montgomery v. Crosthwait*, 832.
 10. **ALTERATION.** — The material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration, whether it is to the benefit or detriment of the parties objecting. *Montgomery v. Crosthwait*, 832.
 11. **GENUINENESS OF SIGNATURE OF MAKER OF NOTE, WHAT SUFFICIENT EVIDENCE OF.** — Where the maker of a promissory note, upon being inquired of concerning its genuineness, and after examining it tells the indorsee that it is all right, evidence of this fact is sufficient to warrant the jury in finding that his signature to the note is genuine. *West Philadelphia Nat. Bank v. Field*, 562.
 12. **PROMISSORY NOTE — JUDGMENT AGAINST PLEDGOR, WHEN CONCLUSIVE AGAINST PLEDGEE.** — The pledgee of a note who actively consents to the prosecution of an action thereon by pledgor against the maker, and gives the note to the pledgor to produce at the trial as evidence of his right to recover, is estopped by the result of that action, and bound by a judgment entered therein on the merits, against the pledgee. *St. Paul Nat. Bank v. Cannon*, 189.
 13. **ASSIGNMENT — CONTRIBUTION.** — A joint maker of a note who holds it by assignment or indorsement from the payee cannot, by indorsing or assigning it to a third person before maturity, convey any right except to sue for contribution, the appearance of his name as one of the makers being sufficient notice to his assignee or indorsee. *Stevens v. Hanna*, 125.
 14. **PLEDGE AS BONA FIDE HOLDER — LIMIT TO RECOVERY ON NOTE.** — Although an indorsee of negotiable paper before maturity, as collateral security for a debt then contracted, stands in the position of a *bona fide* purchaser, and may recover as such against the maker, yet if the latter can show a good defense as to the pledgor, he is entitled to have the recovery limited to the amount of the principal debt for which the collateral security is held. *St. Paul Nat. Bank v. Cannon*, 189.
 15. **INDORSER NOT LIABLE ON HIS INDORSEMENT BY VIRTUE OF PRESENTMENT TO ONE NOT NAMED IN INSTRUMENT.** — Where the maker of a promissory note adds to his signature thereto the word "agent," the indorser cannot be made liable on his indorsement thereof without proof of presentment to and notice of non-payment by the person who signed it. Presentment to another person, though such person be the real principal, is not effectual to bind the indorser. The word "agent," following the name of the maker, is, in the absence of the name of the principal, merely *descriptio personæ*. *Stinson v. Lee*, 257.
 16. **NOTES AND INLAND BILLS — EVIDENCE OF DISHONOR.** — The law of the state where an action is brought determines what is evidence of presentment and dishonor of promissory notes and inland bills of exchange. *Corbin v. Planters Nat. Bank*, 673.
 17. **NOTES AND INLAND BILLS — EVIDENCE OF DISHONOR.** — The rule that protest of a dishonored foreign bill of exchange is ordinarily indispen-

cable, and that the notary's certificate of protest is *prima facie* evidence of presentment and non-acceptance or non-payment, does not extend to promissory notes and inland bills. - As to these the protest is not regarded as an official act, and in the absence of statute, is not receivable as evidence of dishonor. *Corbin v. Planters Nat. Bank*, 673.

18. NOTICE OF DISHONOR by the holder of a note or inland bill, to his indorser, where the parties reside in different places, and the notice is sent by mail, must be mailed in time to be sent the next business day after dishonor, if practicable. *Corbin v. Planters Nat. Bank*, 673.
19. FOREIGN NOTES OR INLAND BILLS — EVIDENCE OF DISHONOR. — Where a promissory note or inland bill is payable in another state, the notarial certificate of protest thereof made in that state is not evidence of dishonor, in a suit brought thereon in the state of Virginia. *Corbin v. Planters Nat. Bank*, 673.
20. WAIVER OF PROTEST BY INDORSER — ESTOPPEL. — Where an indorser indorses a waiver of protest and notice thereof on the note, and promises to pay, he is charged with knowledge of all the paper contained at that time; and this is such a recognition of the binding force of the contract that he is thereafter precluded from making any defense based on matters then apparent on the face of the instrument. *Montgomery v. Crossthwait*, 832.
21. NEGOTIABILITY GOVERNED BY LEX LOCI CONTRACTUS. — Whether a note or inland bill of exchange is negotiable or not is governed by the *lex loci contractus*, although the remedy is governed by the *lex fori*. *Corbin v. Planters Nat. Bank*, 673.
22. NON-PRODUCTION OF PROMISSORY NOTE IN SUIT, WHAT SUFFICIENT EXCUSE FOR. — Where, in an action by an indorsee against the maker of a promissory note, the plaintiff shows that the indorser, to whom the note was surrendered by the plaintiff in exchange for another note, the name of the maker of which was forged, had fled the country on account of said forgery and others, this is a sufficient ground laid to excuse the non-production of the note, and to justify the admission of secondary evidence of its contents. *West Philadelphia Nat. Bank v. Field*, 562.
23. EVIDENCE. — In an action against the indorser of a note, the maker testifying that he was not indebted to the indorser at the time of indorsement, but admitting that he had received a loan of stock from him on which to raise money, may state that the loan of the stock was not considered a debt between them. *Montgomery v. Crossthwait*, 832.
24. FOREIGN NOTES OR INLAND BILLS — PRESUMPTION AS TO PROTEST. — In the absence of proof that the note or bill sued on in Virginia was protestable by the law of the state where it was made payable, the presumption prevails that it was not. *Corbin v. Planters Nat. Bank*, 673.
25. ASSIGNMENT — RIGHT OF ACTION. — Where the effect of an assignment of a note is to render it non-negotiable, the assignee may bring suit thereon in his own name; and if such is not the effect, the indorsement thereof by the assignee, and delivery to a third person, entitles the latter, as holder, to sue in his own name. *Stevens v. Hannan*, 125.
26. DEPOSIT AS PAYMENT OF NOTE. — SUBSEQUENT SUIT BY HOLDER. — Where a note is made payable at a certain bank, the mere deposit of money in that bank to be applied in payment of the note is not a payment, unless the holder has deposited it for collection. The bank receives the money merely as agent for such depositor, and the holder, by bringing an action to recover such deposit, does not thereby

admit payment of the note, nor is he precluded by such action from afterwards seeking to recover against the maker. *St. Paul Nat. Bank v. Cannon*, 189.

- 27. INDEMNITY AGAINST LOST NOTE SUED ON SHOULD BE REQUIRED WHEN.** — Where the maker of a note is sued thereon by an indorsee who has delivered it to an indorser thereof in exchange for a note forged by such indorser, who has fled the country, the defendant is entitled to protection against the possibility of the note turning up in the hands of an innocent holder for value; but the court can give such protection by restraining execution until such indemnity is given. *West Philadelphia Nat. Bank v. Field*, 562.

See CORPORATIONS, 5, 37; HUSBAND AND WIFE; USURY, 1, 2

BILLS OF LADING.

- 1. BILL OF LADING, WHEN JUSTIFIED IN DELIVERING.** — If a bill of lading is attached to a time draft, the transaction ordinarily implies a sale upon credit, and that the bill of lading is retained only to secure the acceptance of the draft, and is to be delivered upon such acceptance, unless there are instructions to hold until payment, or circumstances indicating that the bill is to be held to secure both acceptance and payment. *Bank v. Cummings*, 618.
- 2. BILLS OF LADING, DELIVERY OF, WITHOUT AUTHORITY.** — A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery without such payment; and one thus acquiring a bill of lading indorsed in blank, though acting in good faith in the regular course of business and paying value, acquires no title as against the principal. *Bank v. Cummings*, 618.
- 3. BILL OF LADING TAKEN TO ORDER OF CONSIGNOR, DELIVERY OF, WHEN NOT JUSTIFIED.** — If bills of lading, taken to the order of the consignor, with sight time drafts thereto attached, are indorsed to the cashier of a bank, through which they were to be transmitted for collection, there is no presumption of any authority on the part of the bank to surrender the bills of lading upon acceptance of the drafts, or otherwise than upon their payment; and if the bank makes such a delivery, it is unauthorized, and does not pass the title to the property described in the bills of lading. *Bank v. Cummings*, 618.

See CARRIERS, 2-5.

BONA FIDE PURCHASERS.

See BILLS AND NOTES, 14; DEBTOR AND CREDITOR; DEEDS, 9; GUARDIAN AND WARD; LEE PENDENS; MORTGAGES, 3; TRUSTS, 4; VENDOR AND VENDEE, 10, 11.

BONDS.

See BANKS AND BANKING; EXECUTORS AND ADMINISTRATORS, 5.

BOUNDARIES.

See DEEDS, 8; SURVEYS.

BREACH OF PEACE.

BREACH OF PEACE is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. *People v. Johnson*, 116.

See ARREST.

BROKERS.

See USURY, 4-6.

BURDEN OF PROOF.

See ALTERATION OF INSTRUMENTS, 1; BAILMENT, 1; BILLS AND NOTES, 1, 9; CARRIERS, 5; CORPORATIONS, 30; EXECUTION, 2; HOMICIDE; NEGLIGENCE, 5; RAILROAD COMPANIES, 31; WILLS, 3.

BURGLARY.

ASSISTING IN THE COMMISSION OF WHAT ONE BELIEVES TO BE A CRIME. —

Though one assists, with felonious intent, in the commission of what he believes to be a burglary, yet if the person whom he so assists has no such intent, and is merely seeking to give others an opportunity to catch his assistant while committing the crime, such assistant is not guilty of burglary, unless in the assistance which he rendered he committed every overt act necessary to constitute that crime. *State v. Hayes*, 360.

CARRIERS.

1. **LIABILITY FOR LOSS BY UNPRECEDENTED FLOOD. —** A common carrier is not liable for injury to goods in his possession, caused by an unprecedented flood in a river, and coming on so suddenly that it could not be anticipated by human knowledge or foresight, nor the injury prevented by the exercise of reasonable diligence. *Smith v. Western Railway*, 929.
2. **CARRIER IS NOT LIABLE FOR LOSS OF GOODS BY FIRE WHILE IN THE WAREHOUSE OF ITS AGENT,** in the absence of negligence on the part of the carrier or agent, when the bill of lading stipulates against liability for loss by fire during the time the goods are at any warehouse, depot, etc. *Lancaster Mills v. Merchants' etc. Co.*, 586.
3. **COMMON CARRIER IS EXEMPTED FROM LIABILITY FOR LOSS OF GOODS BY FIRE IF THE BILL OF LADING PURPORTS TO EXEMPT HIM** from liability from loss by fire at any depot, station, landing, or warehouse, if the property, consisting of cotton, is destroyed by fire, without any negligence of the carrier, and while in the warehouse of a press company, in which it was necessary for it to be for the purpose of compression before shipment. *Lancaster Mills v. Merchants' etc. Co.*, 586.
4. **CONSIDERATION FOR A STIPULATION IN A BILL OF LADING EXEMPTING CARRIER FROM LIABILITY** for a loss by fire while the property to be carried is in a warehouse, depot, or station will be presumed, if such stipulation is in a through bill of lading, and a through-rate was granted for carriage over the lines of more than one carrier. *Lancaster Mills v. Merchants' etc. Co.*, 586.
5. **NEGLIGENCE — BURDEN OF PROOF. —** One who seeks to hold a carrier liable for a loss of goods by fire while in the hands of a warehouseman must allege and assume the burden of proving that such loss resulted from the carrier's negligence, if the bill of lading purports to exempt the carrier from liability from loss by fire when the property is in any warehouse. *Lancaster Mills v. Merchants' etc. Co.*, 586.
6. **INSURANCE. — A CARRIER HAS SUCH AN INSURABLE INTEREST IN THE GOODS ENTRUSTED** to it for carriage that it may insure not only its interest or its liability, but the whole value of the goods; and upon so doing, may collect the whole value, and after reimbursing itself for its special loss, hold the surplus in trust for the owners. *Lancaster Mills v. Merchants' etc. Co.*, 586.

- 7. CARRIER NOT LIABLE FOR NOT EFFECTING.** — A common carrier which procures a contract with a cotton-press company, whereby the latter agrees to insure all goods intrusted to it, does not thereby assume the obligation to insure such goods, nor make itself answerable to their owner for the failure of the press company to insure as it agreed to do. *Lancaster Mills v. Merchants' etc. Co.*, 586.

See INSURANCE, 14; RAILROAD COMPANIES.

CHARACTER.

See HOMICIDE, 5; WITNESSES, 3, 4.

CHATTEL MORTGAGES.

- 1. RECORD OF A CHATTEL MORTGAGE EXECUTED IN AN ASSUMED AND FICTITIOUS NAME** does not impute notice to a purchaser who finds the mortgagor in the possession of the property mortgaged and purchases it of him, without notice that he had made the mortgage or done business in the assumed and fictitious name. *Mackey v. Cole*, 728.
- 2. CHATTEL MORTGAGE WITH RESERVATION OF POSSESSION AND POWER TO SELL — CONSTRUCTION.** — A mortgage by an insolvent debtor of the goods and fixtures in his store, reserving the possession thereof until the maturity of the debt, with reserved power of sale of the goods in the usual course of business, but with no reserved power of sale of the fixtures, is void, at the instance of his creditors, as to the goods, but valid as to the fixtures, in favor of the mortgagee, who has no knowledge or notice of the mortgagor's insolvency. *Hayes v. Westcott*, 875.
- 3. CHATTEL MORTGAGE WITH RESERVATION OF POSSESSION — EVIDENCE OF FRAUD IN MORTGAGEE.** — A chattel mortgage reserving the use of the goods to the mortgagor until the maturity of the debt does not necessarily raise an implication of bad faith in the mortgagee, or establish actual evil intent in him. To impute bad faith to him, whether by construction merely or as a fact, it must appear, in addition to the benefit reserved on the face of the instrument, that he was charged with inquiry into the purposes of the mortgage by a knowledge of the mortgagor's insolvency, or at least of the fact that he was indebted. *Hayes v. Westcott*, 875.

CHECKS.

See BANKS AND BANKING.

CLOUD ON TITLE.

- 1. EQUITY.** — Parties not in possession, and without remedy at law, may maintain a suit in equity to remove a cloud from the title to land. *Sneathen v. Sneathen*, 326.
- 2. EQUITABLE JURISDICTION TO REMOVE CLOUD ON TITLE** is preventive as well as remedial. *Sneathen v. Sneathen*, 326.

CONCURRENT NEGLIGENCE.

See NEGLIGENCE, 2.

CONDITIONAL SALES.

See SALES, 1-3.

CONFESSIONS.

See INFANTS, 3.

CONFLICT OF LAWS.**See NEGLIGENCE, 19.****CONNECTING LINES.****See RAILROAD COMPANIES, 19-22.****CONSIDERATION.****See BILLS AND NOTES, 1; CARRIERS, 4; HUSBAND AND WIFE, 2, 14; VENDEE AND VENDER, 4.****CONTRACTS.**

- 1. CHARACTER OF, HOW DETERMINED.** — In determining the real character of a contract, courts will look to its purpose, rather than to the name given to it by the parties; and if one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted. *Dederick v. Wolfe*, 283.
- 2. INTERPRETATION OF, BY AID OF EXTRINSIC CIRCUMSTANCES.** — When a cotton-press company receives cotton and issues dray receipts therefor, which are surrendered by the owner to a common carrier, which issues its bill of lading for the cotton described therein, the obligation of the cotton-press company is not terminated by such surrender, nor is it wholly measured by such receipts; but in order to determine the extent and character of this obligation, we must look to the course of business between the company and depositors of cotton, its relations to cotton buyers and shippers, and its relations, contractual and otherwise, to the carrier who issued the bills of lading upon its dray receipts, and the representations made by its officers and agents to those doing business with it, and especially to those who took and surrendered such receipts. *Lancaster Mills v. Merchants' etc. Co.*, 586.
- 3. AGREEMENT TO DIVULGE SECRET PROCESS TO VENDEE, AND KEEP IT FROM ALL OTHERS, VALID.** — A person carrying on a business founded on a secret process known only to himself and his agents may sell such business, including as an essential part thereof the secret process, and promise to divulge the secret to his vendee, and to keep it from every one else. Such an agreement is not in general restraint of trade, nor opposed to public policy, but is a reasonable measure of mutual protection to the parties, imposing no restraint upon either that is not beneficial to the other, and is therefore valid, especially when the restriction is limited as to time. *Tode v. Gross*, 475.
- 4. NEGLIGENCE — BREACH OF CONTRACT.** — **THIRD PERSON** cannot maintain an action for injuries resulting from a breach of a contract between two other contracting parties. *Roddy v. Missouri P. R'y Co.*, 333.
- 5. NEGLIGENCE — INJURY TO THIRD PERSON — BREACH OF CONTRACT.** — Under a contract between a railway company and a stone-quarry owner, by which the former is to furnish the latter with cars on his own side-track, the former is bound to furnish cars which are reasonably safe for the use of the quarry-owner and his servants. But it is not liable to such servants, not parties to the contract, and over whom it has no control, for injuries received on such side-track, and resulting from its breach of contract with the quarry-owner in furnishing him with a car with defective brakes. *Roddy v. Missouri P. R'y Co.*, 333.
- 6. BREACH OF CONTRACT TO PROCURE INSURANCE — MEASURE OF DAMAGES.** — A contract to procure the insurance of property for the benefit of its
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owner is very different in its legal effect from the absolute liability of an insurer. If the insurance is not procured as stipulated, and the property is subsequently lost, the owner cannot recover for a breach of the contract, if his loss was in fact covered by insurance effected by himself, and the breach of the contract to procure insurance has not damnified him. *Lancaster Mills v. Merchants' etc. Co.*, 586.

7. **CONTRACT FOR PERSONAL SERVICES.** — An oral contract for personal services not to be performed within one year from its execution is within the statute of frauds, and void. *Lee v. Hill*, 666.

8. **SUBCONTRACTOR CHARGEABLE WITH NOTICE OF TERMS OF ORIGINAL CONTRACT.** — A subcontractor is chargeable with notice of all the terms and stipulations of the contract between the original contractor and the owner, and is bound by them, whether he had actual knowledge of them or not. *Bevan v. Thackara*, 529.

See ABATEMENT, 3; BAILMENT, 4; CORPORATIONS, 6, 7; EVIDENCE, 3; PLEADING, 5.

CONTRACTS OF SALE

See SPECIFIC PERFORMANCE; VENDOR AND VENDEE.

CONTRIBUTION.

See BILLS AND NOTES, 12.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSIONS.

See BAILMENT, 2, 3; TROVER.

CORPORATIONS.

1. **CORPORATION DE FACTO EXISTS** when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law, or in other words, when there is an organization with color of law and an exercise of corporate rights and franchises. *Snider etc. Co. v. Troy*, 887.

2. **THE RIGHTFUL EXISTENCE OF A CORPORATION DE FACTO CANNOT BE CALLED IN QUESTION** in a collateral proceeding. *Finch v. Ullman*, 383.

3. **A TRANSFER OF PROPERTY TO OR BY A CORPORATION DE FACTO** will be held valid and binding against all persons except the state. *Finch v. Ullman*, 383.

4. **POWER OF PRIVATE CORPORATION TO SELL ITS PLANT AND RETIRE FROM BUSINESS.** — A private manufacturing corporation has the right, with the consent of all its stockholders, to sell its plant to another corporation and retire from business, taking in payment the stock of such other corporation. And the fact that the stock so taken is issued to and held by a trustee for it does not render the transaction *ultra vires*. *Holmes Mfg. Co. v. Holmes Co.*, 448.

5. **CORPORATION MAY TAKE STOCK OF OTHER CORPORATIONS IN PAYMENT OF DEBT.** — Although a corporation cannot purchase or deal in the stock

of other corporations, unless it is expressly authorized by law so to do, it may take title to such stock in payment of a debt. And a statute prohibiting a corporation organized under it from using any of its funds in the purchase of any stock in any other corporation does not limit its power to take such stock in payment of a debt. *Holmes Mfg. Co. v. Holmes Co.*, 448.

6. **ULTRA VIRES EXECUTORY CONTRACT.** — While an *ultra vires* contract made with a corporation remains executory neither party to it is estopped from asserting its invalidity, nor can either enforce it against the other, even though the fruits of the contract have been received and enjoyed. *Long v. Georgia etc. R'y Co.*, 931.
7. **ULTRA VIRES EXECUTED CONTRACT.** — When an *ultra vires* contract made with a corporation has been fully executed by both parties, neither of them can assert its invalidity as a ground for relief against it. *Long v. Georgia etc. R'y Co.*, 931.
8. **ANY CALL OR ASSESSMENT WHICH REQUIRES SOME OF THE STOCKHOLDERS OF A CORPORATION TO PAY A HIGHER RATE THAN OTHERS** will not be enforced. A call must be made on all alike, or it will be void. Hence if a complaint in an action to recover an assessment shows that some of the stockholders have paid forty per cent of their subscriptions, while others have paid but two per cent, and that a further assessment of thirty-five per cent has been levied upon all stockholders, a demurrer to the complaint must be sustained, on the ground that it appears therefrom that the assessment was unequal, partial, and invalid. *Great Western Tel. Co. v. Burnham*, 698.
9. **UNEQUAL ASSESSMENT AGAINST A STOCKHOLDER OF A CORPORATION, THOUGH MADE BY A COURT OF ANOTHER STATE,** cannot be enforced by action in this state against a stockholder who was not a party to the proceeding in the other state. *Great Western Tel. Co. v. Burnham*, 698.
10. **UNPAID STOCK SUBSCRIPTION — PRESRIPTIVE PRESUMPTION OF PAYMENT.** — When a stockholder in a corporation is sued to recover his unpaid subscription, the defense of prescriptive presumption of payment is sustained by proof that more than twenty years have elapsed without any call upon him for payment, and without any recognition by him of liability on his part. *Semple v. Glenn*, 894.
11. **CALLS FOR UNPAID STOCK SUBSCRIPTIONS — STATUTE OF LIMITATIONS.** — When, by the terms of subscription to the stock of a corporation, payments are to be made in installments as may be called for by the corporation, the statute of limitations does not begin to run in favor of the subscriber until a call is made by the corporation or by a court of competent jurisdiction, although the corporation has abandoned its charter, ceased to do business, and has assigned all its property, including unpaid stock subscriptions, for the benefit of creditors, so that calls cannot be made in the mode prescribed by the contract of subscription. *Semple v. Glenn*, 894.
12. **SUBSCRIPTIONS TO STOCK — JURISDICTION OF EQUITY TO MAKE CALLS.** — If the directors of a corporation neglect or refuse to call in unpaid subscriptions to stock necessary to pay the claims of creditors, equity will take jurisdiction, and make the requisite calls. *Semple v. Glenn*, 894.
13. **A STOCKHOLDER SUING THE DIRECTORS OF A CORPORATION FOR THEIR NEGLIGENCE AND MISMANAGEMENT AS SUCH** must be regarded as suing

- for the benefit of the corporation; and its creditors and share-holders, innocent and guilty, as entitled to share proportionately in the benefits of the decree. He is not entitled to any preference or priority over other creditors or stockholders. *Wallace v. Lincoln Sav. Bank*, 625.
14. **TO ENTITLE A STOCKHOLDER TO BRING A SUIT WHICH SHOULD HAVE BEEN BROUGHT BY THE CORPORATION**, he must show that the majority of its board of directors had wrongfully refused to bring such action, where the corporation has not parted with its right to sue. *Wallace v. Lincoln Sav. Bank*, 625.
 15. **CORPORATIONS, REFUSAL TO SUE.** — The mere refusal of a corporation to bring a suit will not authorize any stockholder dissatisfied with its decision to himself institute an action. It must further appear that the refusal was wrongful. *Wallace v. Lincoln Sav. Bank*, 625.
 16. **CORPORATIONS DE FACTO — ESTOPPEL BY CONTRACT WITH — LIABILITY OF STOCKHOLDERS AS PARTNERS.** — A creditor who has contracted with a *de facto* corporation in its corporate capacity, and within the scope of its assumed powers, is estopped to deny its corporate existence and character, and cannot charge its stockholders, as partners, with a corporate debt, in the absence of fraud. *Snider etc. Co. v. Troy*, 857.
 17. **BOOKS OF, AS EVIDENCE OF SUBSCRIPTION TO STOCK.** — When the name of a party appears on the books of a corporation as a stockholder, the presumption is, that he is the owner of stock; and in a suit against him as such stockholder, the burden of proof is on him to rebut the presumption, and to show that his name was placed there without his authority, express or implied, and that he had no notice that his name thus appeared. *Semple v. Glenn*, 894.
 18. **CONCLUSIVENESS OF JUDGMENT AGAINST, AS TO UNPAID STOCK SUBSCRIPTIONS.** — A judgment against an insolvent corporation foreclosing a deed of assignment made by it is conclusive on the stockholders as to all corporate matters, and property rights and interests in the corporation. It cannot, however, operate to conclusively fix the personal liability to the corporation of the stockholders not made parties for unpaid stock subscriptions. When such stockholders are subsequently sued by the trustee appointed under the decree to recover the amount of their unpaid stock subscriptions, they may, notwithstanding the decree, show that they are not stockholders, though their names appear on the books of the corporation, or that they have paid their subscriptions in full, or that presumption of payment arises from lapse of time. *Semple v. Glenn*, 894.
 19. **ASSIGNMENT BY — PRESUMPTION OF PAYMENT OF STOCK SUBSCRIPTION.** — When an insolvent corporation makes an assignment to trustees, they may at once call in unpaid stock subscriptions, or institute suit for that purpose, and on their default the creditors may thus call them in; but the holders of unpaid stock are not responsible for the default of the trustees or of the creditors, and may rely upon the defense of prescriptive presumption of payment, when sued for unpaid subscriptions after a great lapse of time. *Semple v. Glenn*, 894.
 20. **SUIT AGAINST DIRECTORS FOR MISMANAGEMENT, BY WHOM SHOULD BE BROUGHT.** — A suit against the directors of a corporation for their negligence and mismanagement of its business should be brought by the corporation; but if it is disabled from suing, — as where the managing agents of the corporation, its officers and directors, are themselves to be defendants, or where the corporation wrongfully and will-

fully refuses to sue,—then a court of equity will entertain a suit by a share-holder, substituting him to the corporate right of action. *Wallace v. Lincoln Sav. Bank*, 625.

21. **AUTHORITY OF PRESIDENT AS AGENT.** — The fact that a person having the active conduct of the business of a corporation is also its president does not operate as a limitation upon the powers usually exercised by its general agents or managers. His authority is not limited to that possessed by virtue of his office as president, but is incident to the management of the business. *Ceeder v. Loud etc. L. Co.*, 134.
22. **A STOCKHOLDER OF A CORPORATION, THOUGH HE HAS NOT REQUESTED THE CORPORATION OR ITS DIRECTORS TO BRING SUIT** against the late directors for their negligence and mismanagement, may maintain an action on behalf of himself and the other stockholders and creditors, if, before the commencement of such action, the corporation made a general assignment for the benefit of its creditors, and its assignee, after being requested so to do, refused to institute any action. *Wallace v. Lincoln Sav. Bank*, 625.
23. **A STOCKHOLDER OF A CORPORATION CANNOT MAINTAIN AN ACTION AGAINST ITS DIRECTORS FOR IMPROPERLY DECLARING AND PAYING DIVIDENDS**, and thereby causing a deficit. *Wallace v. Lincoln Sav. Bank*, 625.
24. **DIRECTORS OF A CORPORATION ARE NOT ANSWERABLE FOR LOSSES** resulting from loans made by its cashier, on the ground that they neglected their duties by intrusting to him the sole management of the affairs of the corporation without exercising any supervision over him, if he was not guilty of any want of care and prudence in making the loans or in taking steps to secure or collect them. *Wallace v. Lincoln Sav. Bank*, 625.
25. **DIRECTORS OF A CORPORATION ARE NOT LIABLE FOR NEGLIGENCE IN NOT PREVENTING ITS CASHIER** from making loans to himself, unless it is shown that the corporation sustained loss as a direct consequence of such negligence. *Wallace v. Lincoln Sav. Bank*, 625.
26. **DUTIES AND LIABILITIES OF DIRECTORS.** — Directors by assuming office agree to give as much of their time and attention to its duties as the proper care of the interests intrusted to them may require. If they are inattentive to those duties, neglecting to attend meetings of the board, and turning over the management of the corporate business to the exclusive control of other agents, they are guilty of gross negligence with respect to their ministerial duties, and liable, if loss results to the corporation from breaches of trust or acts of negligence committed by those left in control, and which by due care and attention on their part such directors might have avoided. *Wallace v. Lincoln Sav. Bank*, 625.
27. **THE DILIGENCE REQUIRED OF DIRECTORS OF CORPORATIONS** in the discharge of their duties is that exercised by prudent men in their own affairs, being that degree of diligence characterized as ordinary. *Wallace v. Lincoln Sav. Bank*, 625.
28. **WHAT CONSTITUTES A PROPER PERFORMANCE OF THE DUTIES OF A DIRECTOR** is a question of fact, to be determined in each case in view of all the circumstances, the character of the corporation, the condition of its business, and the usual methods of managing like corporations. *Wallace v. Lincoln Sav. Bank*, 625.
29. **DIRECTORS ARE RESPONSIBLE FOR LOSS RESULTING** from the wrongful acts of other directors, or of agents of the corporation, only when such loss was the consequence of a neglect of duty in the directors

- sought to be charged, either in failing to supervise the corporate business with attention, or in neglecting to use proper care in the appointment of such agents. *Wallace v. Lincoln Sav. Bank*, 625.
30. **DIRECTORS' LIABILITY — BURDEN OF PROOF.** — In an action by a stockholder against the directors of a corporation to recover for losses suffered by it through their negligence and mismanagement, the burden is upon the complainant not only to prove the losses alleged, but to show that they were the consequence of the negligence and mismanagement of the directors. *Wallace v. Lincoln Sav. Bank*, 625.
31. **STATUTE OF LIMITATIONS. — A SUIT BY A STOCKHOLDER AGAINST THE DIRECTORS OF A CORPORATION** to recover for injury suffered by it through their negligence and mismanagement cannot be maintained, if the right of the corporation to bring such suit is barred by the statute of limitations, because a share-holder can enforce only such claims as the corporation itself could enforce. *Wallace v. Lincoln Sav. Bank*, 625.
32. **PRESUMPTION OF DIRECTORS' KNOWLEDGE.** — A director in a suit between himself and the corporation, or those suing upon a corporate right of action, is not presumed to have knowledge of all that is shown by the books of the company. The presumption of knowledge attaching to a director applies only in suits between the corporation and a stranger. *Wallace v. Lincoln Sav. Bank*, 625.
33. **STATUTE OF LIMITATIONS. — SUITS AGAINST THE DIRECTORS OF A CORPORATION** for injury suffered by it, through their negligence and mismanagement, fall within that clause of the statute of limitations providing the time within which actions may be brought upon contracts, because the relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties of his office, and an action for omission of such duty is an action for a breach of this implied contract. *Wallace v. Lincoln Sav. Bank*, 625.
34. **STATUTE OF LIMITATIONS. — DIRECTORS OF A CORPORATION ARE NOT TRUSTEES IN WHOSE FAVOR THE STATUTES OF LIMITATION DO NOT RUN;** and a suit against them for malfeasance, misfeasance, or negligence in office, brought in equity by a stockholder, is subject to the same limitation as if it were an action at law by a corporation. *Wallace v. Lincoln Sav. Bank*, 625.
35. **POWER OF PRESIDENT TO CONTRACT.** — The president of a business corporation may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incidental to his office, and may bind the corporation by contracts in matters arising in the usual course of business. The rule is here applied to notes given in the name of the corporation by its president for the purchase price of mules. *Sparks v. Dispatch Transfer Co.*, 351.
36. **AUTHORITY OF PRESIDENT AS AGENT.** — The president of a manufacturing corporation, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control and management, and to have authority to do what is usually and ordinarily done by such agents or managers. *Ceeder v. Loud etc. L. Co.*, 134.
37. **LIABILITY ON NOTE SIGNED BY PRESIDENT IN HIS NAME ALONE.** — When the president of a corporation signs a negotiable note in his own name alone, with nothing on the instrument to indicate that he is acting as the agent of the corporation, parol evidence is not admissible to establish such agency. *Sparks v. Dispatch Transfer Co.*, 351.

- 33. AUTHORITY OF PRESIDENT AS AGENT IN EMPLOYING MEN.** — The president of a lumber manufacturing corporation, in the active management of its business, and in the absence of proof of any limitation to employ men, or that authority in reference thereto had been conferred upon any other person, has authority to employ men by the season in the business of the corporation. *Ceeder v. Loud etc. L. Co.*, 134.
- 39. POWER OF AGENT.** — The primary intention of a corporation in employing an agent is, that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with such agent upon that understanding. *Ceeder v. Loud etc. L. Co.*, 134.
- 40. THE KNOWLEDGE OF THE OFFICERS, AGENTS, AND EMPLOYEES OF A CORPORATION, THROUGH WHOM IT MUST ACT, IS IMPUTED TO IT.** *Johnson v. First Nat. Bank*, 722.
- 41. ASSIGNEE OF ALL ASSETS OF AN INSOLVENT CORPORATION,** after such assignment, represents the corporation as well as its creditors; and unless he refuses to do so, is alone authorized to bring an action against the late directors of the corporation for their negligence and mismanagement of its affairs. *Wallace v. Lincoln Sav. Bank*, 625.
- 42. ULTRA VIRES — PLEA OF, NOT PERMITTED TO PREVAIL, WHERE IT WILL NOT ADVANCE JUSTICE.** — A plea of *ultra vires* is not permitted to prevail where it will not advance justice, but will accomplish a legal wrong. Where, therefore, a corporation having, through an executed contract, acquired title to the stock of another corporation, sells it, the vendee cannot defeat an action to recover the price thereof on the plea that the transaction by which his vendor acquired title was *ultra vires*, even admitting that it was so. *Holmes Mfg. Co. v. Holmes Co.*, 448.
- 43. MINUTES OF, AS EVIDENCE.** — The minutes of the meetings of a corporation, if identified or shown to be correct or authoritatively made, are *prima facie* evidence of the preliminary proceedings for its incorporation, and are admissible against a stockholder, in an action to recover his unpaid stock subscription, to show that in the subsequent incorporation of a second company to succeed the first there was no material change or departure from the original character and purposes of the first corporation. *Semple v. Glenn*, 894.
- See BAILMENT, 2; BANKS AND BANKING; JUDGMENTS, 13; LIMITATIONS OF ACTIONS, 4; MASTER AND SERVANT, 10.**

COSTS.

COSTS INCLUDE ATTORNEY'S FEE. — The term "costs" denotes in its legal sense not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover from his client for his professional services. *Williams v. Flowers*, 772.

See COVENANTS, 1.

CO-TENANCY.

- 1. MORTGAGE OF UNDIVIDED INTEREST OF ONE.** — Where seven children, as heirs of their deceased father, are tenants in common of lands lying in several different counties, a mortgage by one of them of his interest as heir and distributee in the land lying in a specified county will convey only his undivided one-seventh interest in the land lying in the county specified, and not his undivided interest in all the lands lying in the different counties; and if, on partition of all the lands in the different

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See COVENANTS, 1.

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- 1. MORTGAGE OF UNDIVIDED INTEREST OF ONE.** — Where seven children, as heirs of their deceased father, are tenants in common of lands lying in several different counties, a mortgage by one of them of his interest as heir and distributee in the land lying in a specified county will convey only his undivided one-seventh interest in the land lying in the county specified, and not his undivided interest in all the lands lying in the different counties; and if, on partition of all the lands in the different

- counties, one half of the mortgaged tract is allotted to the mortgager, as his entire interest in all the lands, the estate of the mortgagee is not thereby increased or extended. *Howze v. Dew*, 783.
2. **HUSBAND OF TENANT IN COMMON CANNOT PURCHASE INTEREST OF HER CO-TENANT AT TAX SALE.** *Robinson v. Lewis*, 254.
 3. **PURCHASE OF TAX TITLE BY TENANT IN POSSESSION — PARTITION TO PREVENT ADVERSE POSSESSION.**— When a co-tenant in possession of the common property, under an express agreement binding him to pay the rent, allows the land to be sold for unpaid taxes, and becomes the purchaser by redeeming therefrom, the other co-tenants may repudiate the contract, and by partition proceedings prevent the adverse occupancy under the tax title from maturing into a perfect title by adverse possession. *Donnor v. Quartermas*, 778.
 4. **ACQUISITION OF TAX TITLE BY CO-TENANT.**— A co-tenant in possession under an agreement expressly binding him to pay the taxes in consideration of occupancy, without the payment of rent, cannot, by allowing the land to be sold for unpaid taxes and redeeming therefrom, acquire any title as against his co-tenants. The tax title thus acquired inures to the benefit of them all. *Donnor v. Quartermas*, 778.
 5. **PURCHASE OF TAX TITLE** against the common property by one co-tenant inures to the benefit of all the co-tenants. The purchaser thereunder can claim no benefit, except as a basis to compel the remaining co-tenants to reimburse him for their *pro rata* share of the common burden on the land. *Donnor v. Quartermas*, 778.
 6. **NOTICE — TAX SALE.** — Notice to one tenant in common of proceedings to subject the common property to sale for unpaid taxes is not notice to the other tenants, nor does it prejudice their rights. Such sale, without notice to all the co-tenants, is void. *Howze v. Dew*, 783.

See PARTITION.

COUNTIES.

See ATTACHMENT, 1, 2; COURTS.

COURTS.

COURTS, WHEN DO NOT ACT JUDICALLY. — Each county court in Missouri is given power to transact all county and such other business as may be prescribed by law, and to audit, adjust, and settle all accounts to which the county shall be a party, and an appeal is allowed in any case in which an account, or any part thereof, is rejected; but the action of the court is not judicial, and its allowance of an account has not the effect of a judgment, and does not preclude the county from resisting an action upon an account after its allowance. *Sears v. Stone County*, 378.

See APPEAL, 1.

COVENANTS.

1. **COVENANT OF WARRANTY OF REMOTE VENDOR — MEASURE OF DAMAGES RECOVERABLE UPON, BY EVICTED VENDEE.** — The measure of damages recoverable by an evicted vendee upon a covenant of warranty of a remote vendor is not limited to the price paid by such vendee to his immediate vendor, but is the value of the land at the time of its conveyance by such remote vendor, which value is conclusively determined by the price paid to him for it, together with interest on such price for so

long a time as such evicted vendee has been held liable to the owner for mesne profits and the taxed costs expended by him in defending the suit in ejectment. But he cannot recover his attorney's fees, nor costs not taxed. *Brooks v. Black*, 259.

2. **PARTY TO CONTRACT LIABLE FOR BREACH OF COVENANT COMMITTED BY HIS AGENTS WHEN.** — Where a party to a contract covenants that neither he nor his agents will, for a limited time, do certain specified acts, the doing of such acts by said agents, or either of them, within such time, will constitute a breach of the covenant by the covenantor, although he himself does no personal act in violation of the covenant. While it is his exclusive covenant, it relates to the actions of others, and if they do what he agreed that they would not do, it is a breach by him, although not his own act. *Tode v. Gross*, 475.

See DAMAGES, 2.

CRIMINAL LAW.

DECOYS AND CRIMINALS. — When one who is willing to commit a crime acts in concert with another, who is seeking to decoy him and to secure his apprehension and punishment, if each of the acts essential to the perpetration of the crime is done by the defendant with criminal intent his guilt is complete, no matter what motives may prompt or what acts may be done by the party who is apparently assisting him, but the defendant, though present with a criminal intent, cannot be charged with any of the acts of the decoy, whose intent is not criminal. Hence the defendant can be convicted of such crime only as resulted from his own overt acts. *State v. Hayes*, 360.

See APPEAL, 10, 12; ARREST; ASSAULT; BREACH OF PEACE; BURGLARY; EVIDENCE, 6; HOMICIDE; INFANTS, 2, 3; JUDGMENTS, 14-17; LARCENY.

CUSTOM.

See USURY, 6.

DAMAGES.

1. **DAMAGES RECOVERABLE FOR A WRONG** are not diminished by the fact that the party injured has been partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrong-doer did not contribute. *Dillon v. Hunt*, 374.
2. **ACTUAL DAMAGES FOR BREACH OF COVENANT LIQUIDATED BY NAMING SPECIFIC SUM AS STIPULATED DAMAGES WHEN.** — Where the actual damages for the breach of a covenant will be necessarily wholly uncertain and incapable of being ascertained, except by conjecture, an intention to liquidate them is shown by the parties to the agreement by their providing that a sum named shall be as stipulated damages; and the use of the word "penalty," under such circumstances, is not controlling. *Tode v. Gross*, 475.

See CONTRACTS, 6; COVENANT, 1; EJECTMENT, 3; EXECUTIONS, 2; JUSTICES OF THE PEACE, 1; RAILROAD COMPANIES, 30; TELEGRAPH COMPANIES, 2; VENDOR AND VENDEE, 1-3, 7.

DEATH.

See ATTACHMENT, 6; ABATEMENT; LEASE, 6; PARTNERSHIP, 2.

DEBTOR AND CREDITOR.

SUBROGATION WILL NOT BE ENFORCED to the prejudice of a *bona fide* innocent purchaser. *Ahern v. Freeman*, 206.

See **INSURANCE**, 1.

DECLARATIONS.

See **EVIDENCE**, 7.

DECOYS.

See **CRIMINAL LAW**.

DEED OF SETTLEMENT.

See **HUSBAND AND WIFE**, 13.

DEEDS.

1. **WORD "HEIRS," IN DEED, CONSTRUED AS MEANING CHILDREN WHEN.** — Where, from the language of a deed and from the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs," meant children, it will be so construed, and effect thus given to the instrument, notwithstanding the general rule that a conveyance to the heirs of a person living is void for uncertainty. In this respect there is no distinction between grants and wills. *Heath v. Hewitt*, 438.
2. **HOW SHOULD BE CONSTRUED.** — The construction of a grant must be favorable, and as near the meaning and intention of the parties as the rules of law will admit, and to ascertain this intention, parol evidence may be resorted to, not to contradict or vary the words of the grant, but to show, from the situation and conditions of the subject-matter, what meaning the parties attached to the words used, especially in matters of description. *Lego v. Medley*, 706.
3. **DELIVERY OF DEED DURING LIFETIME OF GRANTOR** is an essential element of a valid transfer of the title of real estate, because a deed cannot be made to perform the functions of a will, but the delivery need not be made to the grantee in person. *Sneathen v. Sneathen*, 326.
4. **DELIVERY BY THIRD PARTY.** — The rule that a grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it. It is sufficient that the deed is delivered to a third person for the grantee without reservation, and with intention that it shall take effect and from that time operate as a transfer of the title. *Sneathen v. Sneathen*, 326.
5. **DELIVERY BY THIRD PARTY. — WIFE OF GRANTOR** may be the third party to whom the grantor delivers the deed for the grantee. *Sneathen v. Sneathen*, 326.
6. **DELIVERY BY THIRD PERSON.** — A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person so delivered, is valid, though the grantor is dead at the date of the last delivery. In such case it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect as a present transfer. Such intent may be manifested by acts or words, or by both. *Sneathen v. Sneathen*, 326.
7. **INFANT GRANTEE — PRESUMPTION.** — When the grantee in a deed is an infant, the law presumes assent on his part to the beneficial conveyance; and knowledge thereof and of its delivery are not essential. *Sneathen v. Sneathen*, 326.

- 8. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THE BOUNDARIES OF A TRACT OF LAND** which has been excepted by the grantor from his deed, by the description, "one acre from the southwest corner of the southwest quarter of the southwest quarter of section 9, together with the buildings thereon"; and if it appears from such evidence that the grantor was, at the time of executing the deed, and ever thereafter, in possession of a dwelling and out-buildings, and a tract of land sixteen rods long from east to west, and ten rods wide from north to south, on which such buildings were situated, and that an acre cannot be laid off at such southwest corner which will include all such buildings without being of the dimensions named, and without excluding the whole of a highway running along the south side of the lands described in the exception, then such exception must not be considered as calling for a tract in a square form, but as embracing such parallelogram, and excluding all of such highway. *Lego v. Medley*, 706.
- 9. A PURCHASER BY A QUITCLAIM DEED FOR VALUE** acquires title as against every prior unrecorded deed and every instrument in writing which may be recorded whereby the real estate conveyed may be affected in law or in equity; but equities which arise from transactions or a state of facts not required to be in writing or recorded are not cut off by a quitclaim deed. *Hope v. Blair*, 366.
- See **ACKNOWLEDGMENTS; ATTACHMENT, 5; FRAUDULENT CONVEYANCES, 1, 2; MINES AND MINING.**

DEFINITIONS.

- "Agent." *Stinson v. Lee*, 257.
- "Attempt." *Jackson v. State*, 860.
- "& Co." *Montgomery v. Crosshwaite*, 832.
- "Bodies politic and corporate." *Waterbury v. Board of Commissioners*, 67.
- "Breach of peace." *People v. Johnson*, 116.
- "Consider." *Bancroft v. Otis*, 904.
- Conversion. *Bolling v. Kirby*, 789.
- "Costs." *Williams v. Flowers*, 772.
- De facto* corporation. *Snider v. Troy*, 887.
- "Due diligence." *McCracken v. Flanagan*, 481.
- Duress. *Cribbs v. Soule*, 166.
- "Engineer was whooping them up pretty fast that morning." *Alabama etc. R. R. Co. v. Hill*, 764.
- "Habitual drunkard." *Rude v. Nass*, 717.
- "Heirs." *Heath v. Hewett*, 438.
- "Here he is." *Maury v. State*, 291.
- "Hire." *Farguhar v. McAlevy*, 497.
- "Hold it admissible for what it was worth." *Louisville etc. R. R. Co. v. Hall*, 863.
- Impotency. *Payne v. Payne*, 240.
- "Island." *Butler v. Grand Rapids etc. R. R. Co.*, 84.
- "Issue." *Parkhurst v. Harrower*, 507.
- Jurisdiction. *Hope v. Blair*, 366.
- Lease. *Farguhar v. McAlevy*, 497.
- "May look to." *Bancroft v. Otis*, 904.
- "Negligence." *Rodily v. Missouri etc. R'y Co.*, 333.
- Officer *de facto*. *Dabney v. Hudson*, 276.

- "One acre from the southwest corner of the southwest quarter of the southwest quarter of section nine (9), together with buildings thereon." *Lego v. Medley*, 706.
- "One iron-gray horse, a gelding." *State v. McDonald*, 25.
- Payment of loss. *Lancaster Mills v. Merchants' etc. Co.*, 585.
- "Penalty." *Tode v. Gross*, 475.
- "Person." *Waterbury v. Board of Commissioners*, 67.
- Private wharf. *Compton v. Hankins*, 823.
- Privileged communication. *Rude v. Nass*, 717.
- "Reasonable diligence." *Guiterman v. Sharvey*, 218.
- "Related to." *Bennett v. Van Riper*, 416.
- "Relations." *Bennett v. Van Riper*, 416.
- Retail liquor seller. *Barden v. Montana Club*, 27.
- Subject-matter of a suit. *Hope v. Blair*, 366.
- Trade-mark. *Hoyt v. Hoyt*, 575.

DEVISES.

1. CONSTRUCTION — FEE-SIMPLE. — When a will gives the legatee therein an estate for life, with power to sell, and to possess and enjoy it during life as if she enjoyed a fee-simple estate therein, with remainder to the testator's nephews and nieces, the legatee takes an estate in fee-simple absolute, and the remainder over is void for repugnancy. *Bowen v. Bowen*, 664.
2. CONSTRUCTION — ESTATE IN FEE. — Where a testator by will bequeaths his estate to his five daughters absolutely, and then provides that the share bequeathed to one of them shall be held by his executor for her sole use and benefit during her life, and at her death the balance, if any, to go to her children, she will take an estate in fee-simple, the limitation over being void for repugnancy. *Hall v. Palmer*, 653.
3. CONSTRUCTION — CREATION OF LIFE ESTATE. — Where a testator devises land to his son for life, with remainder to his issue, if any there be at the time of his death, in fee-simple, the issue of any deceased child to take the same share and estate as the parent would have been entitled to if living at the death of the said son, and on failure of issue of said son or of his deceased child or children, the land to go to the testator's heirs at law, the son will take only a life estate, because the word "issue" means only those children and grandchildren of the son who are living at the time of his death. *Parkhurst v. Harrower*, 507.
4. SPENDTHRIFT TRUSTS — WILLS EXEMPTING BEQUESTS FROM EXECUTION. — If a testator by his will sets apart real and other property in the hands of his executor, to be by him held in trust for the testator's brother, declaring that the profits of such property are set apart under the superintendence of the executor for the use of the brother, but that neither the estate nor profits "shall be bound for his past debts, or future debts or liabilities other than decent and comfortable support," and at his death that the property shall pass to C. Y. M., the beneficiary does not take any absolute property in the profits of the estate which he might have assigned or aliened, nor can such profits be reached by a creditor's bill against him. *Garland v. Garland*, 682.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

See ADVERSE POSSESSION, 4.

DRAFTS.

See BANKS AND BANKING; BILLS OF LADING, 1.

DRAINAGE.

See RIPARIAN RIGHTS, 4.

DURESS.

1. **DURESS EXISTS** WHEN there is a fear of imprisonment incited by threats. *Cribbs v. Soule*, 166.
2. **RECOVERY OF MONEY EXTORTED BY DURESS.** — If a man seventy years of age is threatened with criminal prosecution, and on account of his age and his ignorance of the law, he is so put in fear that his will is overcome and he pays money to another, not of his own free will, but because of the fear, the money is paid under duress, and may be recovered. — *Cribbs v. Soule*, 166.

EJECTMENT.

1. **COMMON SOURCE OF TITLE.** — If both parties to an action claim to have derived title from the same person, neither is required to show title in him. *Finch v. Ullman*, 383.
 2. **STATUTE OF LIMITATIONS AGAINST EQUITABLE TITLE.** — One who has an equitable title to realty, though he has no right to recover possession by an action at law, has a real and substantial right to the land and its possession, which can be extinguished only by an actual, consecutive, adverse possession for the time required to extinguish legal title by prescription. *Sherwood v. Baker*, 399.
 3. **DAMAGES IN AN ACTION OF EJECTMENT MAY INCLUDE THE RENTS AND PROFITS ACCRUING AFTER THE COMMENCEMENT OF THE ACTION**, down to the time when the assessment of damages is made. *Hope v. Blair*, 366.
- See EVIDENCE, 4; EXECUTORS AND ADMINISTRATORS, 6; JUDGMENTS, 11; VENDOR AND VENDEE, 8.**

EMINENT DOMAIN.

See TELEGRAPH COMPANIES.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

EQUITABLE CONVERSION.

See EXECUTORS AND ADMINISTRATORS, 1.

EQUITY.

EQUITY JURISDICTION — ACCOUNT. — Equity has no jurisdiction in cases of account, where the remedy at law is complete and adequate. Hence when one is employed to buy wood at a fixed price per cord, and the only issue in dispute is the amount bought and the sum due, equity has no jurisdiction to enjoin an action at law brought to recover such sum,

although the account is long, and much of it is disputed. *Goddin v. Bland*, 678.

See CLOUD ON TITLE; CORPORATIONS, 12; EXECUTORS AND ADMINISTRATORS, 3, 6; FRAUDULENT CONVEYANCES, 1; PARTITION, 1; TRUSTS, 2.

ERROR.

See APPEAL.

ERROR (WRIT OF).

See ABATEMENT, 4; HABEAS CORPUS, 2.

ESTATES.

See DEVISES; MINES AND MINING.

ESTATES OF DECEDENTS.

See EXECUTORS AND ADMINISTRATORS.

ESTATES IN ENTIRETY.

See HUSBAND AND WIFE, 7, 10.

ESTOPPEL.

1. **ESTOPPEL IN PARS — WHAT CONSTITUTES.** — To create an equitable estoppel, representations need not been made with an actual fraudulent intent. It is sufficient that he who made them knows or ought to know the truth, and makes them intentionally, under such circumstances as show an intention or reasonable anticipation that the party to whom they are made or are to be communicated will rely and act on them as true, and that he has so relied and acted on them so that to permit the former to deny their truth will operate as a fraud. *Stevens v. Ludlum*, 210.
 2. **ESTOPPEL IN PARS — STATEMENT TO COMMERCIAL AGENCY.** — One making representations to a commercial agency in relation to his business or the business of any concern with which he is connected must be held to intend that they will be communicated by the agency to any patron who may have occasion to inquire; and when the representations so made are communicated as those of the person making them to a patron of the agency, who relies and acts on them, he may claim an equitable estoppel against the maker. *Stevens v. Ludlum*, 210.
 3. **CONSTITUTIONALITY OF STATUTE.** — Where a city has demanded and received taxes for several years under an unconstitutional statute, treating it as if valid, it is estopped from claiming additional taxes for those years on the ground that such statute is unconstitutional. *Philadelphia v. Ridge etc. R'y Co.*, 512.
 4. **VOLUNTARY PAYMENT OF TAXES** on land by one without any record title, and without any notice to the real owner, who immediately protests in a proper manner, does not estop the latter from asserting his ownership to the land. *Butler v. Grand Rapids etc. R. R. Co.*, 84.
- See ADVERSE POSSESSION, 2; AGENCY, 3; BILLS AND NOTES, 5, 20; CORPORATIONS, 16; EXECUTORS AND ADMINISTRATORS, 7; MARRIAGE AND DIVORCE, 4; MORTGAGES, 4; PUBLIC LANDS, 3; TRIAL, 4.

EVIDENCE.

1. **ADMISSIBILITY OF PHOTOGRAPH.** — In an action to recover for a personal injury, a photograph of a trestle and a wrecked train of cars, taken

about two hours after the accident occurred, and verified by the testimony of the photographer as being a correct representation of the locality and scene, is admissible in evidence, to aid the jury in properly understanding the case. *Kansas City etc. R. R. Co. v. Smith*, 753.

2. A PHOTOGRAPH HAVING BEEN RECEIVED IN EVIDENCE without any testimony as to its correctness or of the point of view from which it was taken, and the court, not being able to agree upon its admissibility, "hold it admissible for what it was worth." *Louisville etc. R. R. Co. v. Hall*, 863.
3. EVIDENCE TO VARY CONTRACT ADMISSIBLE AS TO THIRD PARTY. — Although the parties, as between themselves, cannot introduce parol evidence to contradict their contract, a third person, who is a stranger to the contract, but affected by its terms, may show by parol what was the true meaning and scope of the contract, and that it amounted to a mere revocable license only. *Bruce v. Roper Lumber Co.*, 657.]
4. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT BOTH PARTIES TO AN ACTION CLAIM THROUGH A COMMON SOURCE OF TITLE. *Finch v. Ullman*, 883.
5. PAROL EVIDENCE OF JUSTICE'S JUDGMENT rendered during a former term of office is not admissible on proof of search in his office for his docket and papers, and in the absence of proof that he has been in office continually since the judgment was rendered, or has succeeded himself after being out one or more terms. *Roach v. Privett*, 819.
6. RECORD IN CRIMINAL ACTION INADMISSIBLE IN CIVIL SUIT WHEN. — In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's driver, the record of a criminal action against such driver is not relevant to the issue, and is therefore properly excluded. *Summers v. Bergner etc. Co.*, 518.
7. DECLARATION AS TO SPEED OF TRAIN. — In an action to recover for personal injury received in a railroad accident, the declaration of a passenger to the conductor, made before the accident, that, in his opinion, the "engineer was whooping them up pretty fast that morning," is, by itself, inadmissible as part of the *res gestæ*, or to establish the rate of speed at which the train was moving. *Alabama etc. R. R. Co. v. Hill*, 764.
8. PRACTICE. — Evidence of an agent of an owner of a lot that he made no contract for any one to remove a wall therefrom, and did not know it was being removed, is not admissible in an action against the lot-owner for damages resulting from negligence in the removal, when there is evidence tending to show that such removal was done with the previous knowledge and assent of such owner. *Dillon v. Hunt*, 374.
9. DEATH OF PARTY PENDING ACTION. — Where one of the parties dies pending the action, thereby rendering the other party incompetent to testify, statements made by him at the first trial may be proved at the second trial by the evidence of other witnesses. *Lee v. Hill*, 686.
10. TESTIMONY OF WITNESS AT FORMER TRIAL. — Where the deposition of a witness is taken and produced in a case, his testimony on a former trial cannot be proved on the ground of his absence from the state; nor will the failure of a witness to recollect the particular facts, short of mental imbecility, admit proof of his testimony at a former trial. *Stein v. Swenson*, 234.
11. LANDS, DESCRIPTION OF. — IF A GIVEN QUANTITY OF LAND IS EXCEPTED OUT OF A CORNER OF A TRACT, it must be generally laid off in a square form; but parol evidence is admissible to show that such was not the

intention of the parties, and their intention, when shown, must be respected, and the tract laid off accordingly. *Lego v. Medley*, 706.

See ASSAULT, 3, 4; BILLS AND NOTES, 4, 11, 12, 16, 17, 19, 22, 23; CORPORATIONS, 17, 43; HUSBAND AND WIFE, 4, 5; INSURANCE, 2, 15, 16; MECHANICS' LIENS, 4; NEGLIGENCE, 4-9; PHYSICIANS AND SURGEONS, PLEADING, 5; PUBLIC LANDS, 6; RAILROAD COMPANIES, 9, 14.

EXCEPTIONS.

See MINES AND MINING, 2.

EXECUTIONS.

1. **SHERIFF—DILIGENCE REQUIRED IN MAKING LEVY—NEGLIGENT DELAY.**—Reasonable diligence is all that is required of a sheriff in making a levy under execution. What is reasonable diligence depends upon the particular facts, in connection with the duty, and a delay from four o'clock of one day to the forenoon of the next day may be unreasonable and negligent, in view of the special instructions received and the facts known to the officer, and the apparent necessity for immediate action on his part. *Guiterman v. Sharvey*, 218.
2. **SHERIFF—LIABILITY FOR NEGLIGENT DELAY IN SERVING PROCESS—BURDEN OF PROOF.**—The return of an execution wholly unsatisfied, after a negligent delay by the sheriff in making the levy, establishes *prima facie* his liability for the whole amount of the judgment. It is incumbent on him to show, in mitigation of damages, that some part of such judgment might have been collected by the judgment creditor. *Guiterman v. Sharvey*, 218.
3. **EXECUTION SALE AS SATISFACTION OF JUDGMENT.**—When property is sold by direction of the plaintiff in execution, with notice of a defect in the title, and he bids it off for a price sufficient to pay the judgment, the latter is thereby satisfied; and in the absence of fraud, imposition, or mistake, he cannot repudiate the purchase nor resist the effect of his bid on the mere ground that defendant in execution had no title to nor interest in the property. *Thomas v. Glazener*, 830.
4. **EXECUTION PREMATURELY ISSUED—COLLATERAL ATTACK.**—An execution prematurely issued on a valid judgment is irregular and voidable, but not void; and although it may be set aside in a direct proceeding, a sale under it cannot be collaterally impeached. *Waldrop v. Friedman*, 775.
5. **LEVY AFTER RETURN DAY.**—A justice's execution cannot properly be levied after the expiration of the latest return day allowed by law, whether it specifies a return day or not. A levy after the expiration of such day is void, and an order of sale, and sale founded on it, are also void. *Waldrop v. Friedman*, 775.
6. **EXECUTION SALE—REDEMPTIONER—PURCHASER FOR VALUE.**—One redeeming from an execution or mortgage sale is a purchaser for value of whatever interest he acquires by the redemption, as fully as if he had purchased the certificate of sale from the purchaser. *Ahern v. Freeman*, 206.

See EXEMPTIONS, 4.

EXECUTORS AND ADMINISTRATORS.

1. **POWER GIVEN EXECUTOR TO CONVERT REALTY INTO MONEY FOR SPECIFIC PURPOSE EXTINGUISHED WHEN SUCH PURPOSE IS ACCOMPLISHED**

WITHOUT CONVERSION. — When a testator authorizes his executor to sell and convert into money all or a part of his realty for a specific purpose, which fails, or is accomplished without a conversion, the power is extinguished, and the land cannot be sold by virtue of it, or treated as money, but it descends to the heir, unless it is devised. *Sweeney v. Warren*, 468.

2. POWER CONFERRED UPON EXECUTOR PRESUMED TO BE GIVEN TO BE EXECUTED IN INTEREST OF ESTATE. — When a power is given to an executor by virtue of his office, and not to him as an individual, there being no other evidence that it was intended to be beneficial to him, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for his own benefit. *Sweeney v. Warren*, 468.

3. EQUITY — JURISDICTION OVER PERSONAL ESTATE IN ANOTHER STATE. — A court of equity has no jurisdiction to take the personal property of an estate situated in another state at the time of the death of the decedent, out of the hands of its custodian there, and transfer it to executors in this state. It can only be reached by ancillary administration obtained in the state where the property is situated. *Lines v. Lines*, 487.

4. PERSONAL ESTATE OF TESTATOR NOT DISCHARGED FROM PAYMENT OF HIS DEBTS WITHOUT CLEAR PROOF THAT HE INTENDED IT TO BE SO. — The personal estate of a testator will not be discharged from the burden of paying his debts, unless it clearly appears that he intended that it should be; and this will not be inferred from the fact that authority is given to sell all or some part of his real estate for the payment of his debts, especially where no disposition is made of the personalty. *Sweeney v. Warren*, 468.

5. DECREE ON ACCOUNTING ADMISSIBLE AGAINST SURETIES OF ADMINISTRATOR. — In a suit by distributees against the sureties on the bond of an administrator, a decree in the course of administration, fixing the amount due by him to the estate, is admissible in favor of the plaintiffs, and is *prima facie* evidence of the amount due, although such decree is rendered after his death upon an account of the administration presented by his administrator. *Williams v. State*, 299.

6. EQUITY WILL AID A PURCHASER AT AN ADMINISTRATOR'S SALE who is entitled to but has not received a conveyance from the administrator, by denying recovery in ejectment to the heirs, or by vesting him with the perfect title, provided he has on his part complied with all the terms of the sale. *Sherwood v. Baker*, 399.

7. HEIRS NOT ESTOPPED FROM SUING TO RECOVER LAND SOLD BY EXECUTOR WHEN. — Where an executor sells lands of his testator, under a supposed power in the will, to the testator's widow, both parties knowing at the time that the testator's personal property was more than sufficient to pay all debts and the expenses of administration, the widow not paying the purchase price, but simply receipting for it as so much personalty, and upon the final settlement of the executor's accounts all the heirs are cited to appear, and said accounts are settled, the proceeds of said sale being treated and disposed of as personalty, such heirs are not estopped from maintaining an action against said widow for the recovery of the land so conveyed to her. *Sweeney v. Warren*, 468.

8. PROBATE SALES, PRESUMPTIONS IN SUPPORT OF. — If the records of a probate court show an order to sell real property to pay debts, a report
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of the sale made thereunder, an order approving the sale and directing the administrator to convey to the purchaser, it will be presumed that the sale was authorized, and that all requisite antecedent steps were duly and timely taken, until the contrary appears. *Sherwood v. Baker*, 399.

See ABATEMENT, 3, 4; LANDLORD AND TENANT, 5; LIMITATIONS OF ACTIONS, 2, 5; PARTNERSHIP, 6.

EXEMPTIONS.

See ATTACHMENT; DEVISES, 4.

EXTINGUISHMENT OF DEBT.

See ALTERATION OF INSTRUMENTS.

FALSE REPRESENTATIONS.

See FRAUD.

FARES AND TICKETS.

See RAILROAD COMPANIES, 23-27.

FINDER.

See LARCENY, 3-8.

FOREIGN JUDGMENTS.

See JUDGMENTS, 8, 9, 12.

FORGERY.

See PAYMENT.

FRAUD.

1. FALSE REPRESENTATION MAY BE MADE BY PRESENTING THAT WHICH IS TRUE SO AS TO CREATE AN IMPRESSION WHICH IS FALSE, and then profiting by the false impression thus created. *Lomerson v. Johnston*, 410.
2. FALSE IMPRESSIONS. — MORTGAGE OBTAINED FROM A WIFE UNDER THE BELIEF, ON HER PART, that its execution was necessary to prevent the immediate arrest and imprisonment of her husband is inequitable, and the mortgagee will not be permitted to retain it, when he procured it by statements to the wife, which, though not false in themselves, produced, as he knew and intended they should, a false impression of danger to her husband. *Lomerson v. Johnston*, 410.

See ALTERATION OF INSTRUMENTS, ESTOPPEL, 1, 2; HUSBAND AND WIFE, 1-7; TRUSTS, 5.

FRAUDULENT CONVEYANCES.

1. RELIEF IN EQUITY TO PROTECT TITLE ACQUIRED IN FRAUD OF CREDITORS. — If a husband conveys property to his wife for the purpose of defrauding his creditors, and upon her refusal to reconvey, assists one of his creditors to obtain a decree against her, without her knowledge and without service of process upon her, setting aside the conveyance, and directing the property to be sold, and then purchases at the sale made under the decree, equity will, at her instance, set aside the decree and the sale thereunder, and will not refuse relief on the ground that her

title was acquired in fraud of the creditors of her husband. *Stillwell v. Stillwell*, 408.

2. DEED EXECUTED BY AGED AND INFIRM GRANTOR. — A deed executed by a grantor seventy-eight years old, able to attend to his ordinary business affairs, is not presumably made under the influence of fraud, compulsion, and undue influence, although he may be physically infirm and weakened mentally. *Sneathen v. Sneathen*, 326.

See CHATTEL MORTGAGES, 2, 3; HUSBAND AND WIFE.

GARNISHMENT.

See ATTACHMENT.

GIFTS.

See HUSBAND AND WIFE, 6.

GRANTS.

PUBLIC LANDS — SURVEY — PATENT, WHAT INCLUDED WITHIN. — Where the government has surveyed its land along the bank of a navigable river, and has sold and conveyed such land by government subdivisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserved them when not surveyed. The grantee under such patent cannot be divested by a subsequent survey and grant of such unreserved islands. *Butler v. Grand Rapids etc. R. R. Co.*, 84.

GUARDIAN AND WARD.

SALE BY GUARDIAN AND IMMEDIATE RECONVEYANCE TO HIM. — If a sale and conveyance are made by a guardian of land of his ward, to one who immediately reconveys to the guardian individually for the same consideration, the title of the ward is not divested by these transactions. Hence a subsequent purchaser from the guardian acquires no title. *Winter v. Truax*, 160.

See INFANTS, 1.

HABEAS CORPUS.

1. ONE CONVICTED OF SELLING INTOXICATING LIQUORS in violation of a local-option law will not be discharged on *habeas corpus* on the ground that such law was not legally adopted, when that is a question for the determination of the trial court, and reviewable by an appeal. *Ex parte Mitchell*, 324.
2. HABEAS CORPUS WILL NOT LIE TO CORRECT ERRORS of trial courts, and cannot be substituted for appeals and writs of error. *Ex parte Mitchell*, 324.

HOMESTEAD.

1. MORTGAGE OF A HOMESTEAD IS NOT VALID UNLESS SIGNED BY BOTH HUSBAND AND WIFE; and her answer in a suit to foreclose a mortgage, admitting it to be valid and consenting to its foreclosure, is not equivalent to her signing it. *O'Malley v. Ruddy*, 702.
2. MORTGAGE WILL NOT BE REFORMED SO AS TO INCLUDE THE HOMESTEAD OF THE MORTGAGORS, though such homestead was intended to be embraced in it, if the statute of the state declares that no mortgage of a home-

stead by a married man shall be valid or of any effect without the signature of his wife to the same, though before suit was brought the husband had died, and the widow by her answer assented to such reformation. *O'Malley v. Ruddy*, 702.

HOMICIDE.

1. **HOMICIDE IN RESISTING UNLAWFUL ATTACK IS NOT MURDER, NO MALICE BEING SHOWN.** — Where twelve armed men, late at night, ride to the home of the defendant, by whom one of them had been beaten a few days before, call for him without having or professing to have any authority to arrest him, search the premises for him, and in doing so break open the smoke-house, and upon some one in or near the cotton-house crying out, "Here he is," advance towards that place, and the defendant, with several of his friends in hiding in the cotton-house, fire upon the attacking party, killing two of them, the crime of murder is not predicable of these facts. *Maury v. State*, 291.
2. **MURDER — RES GESTÆ — EVIDENCE.** — In a trial for murder, where the evidence shows that the accused, after being knocked down by the deceased, armed himself, and, returning in from two to five minutes, shot and killed the deceased upon the renewal of the quarrel, the particulars of the whole transaction are admissible in evidence as being parts of the *res gestæ*, although, strictly speaking, all that occurred did not form one continuous transaction. *Stitt v. State*, 853.
3. **SELF-DEFENSE — RETREAT.** — One in his own domicile may defend himself without retreating therefrom; but after retreating from it, this principle no longer applies, and he cannot then strike with a deadly weapon, unless it reasonably appears to be necessary to save himself from grievous bodily harm. *Martin v. State*, 844.
4. **MURDER — SELF-DEFENSE — BURDEN OF PROOF.** — To substantiate a plea of self-defense, the burden is on the accused to negative a reasonable and safe avenue of escape from the danger which threatened him. *Stitt v. State*, 853.
5. **PROOF OF CHARACTER OF DECEASED.** — On a trial for murder, proof that the deceased had a violent temper is not rebutted by evidence that his character was not bad. Character for violent temper and for being bad are not the same. *Martin v. State*, 844.
6. **MURDER. — EVIDENCE OF FORMER DIFFICULTY AND OF THREATS** made in connection therewith are admissible on the part of the prosecution in a trial for murder, although the particulars of such difficulty are not admissible. *Stitt v. State*, 853.
7. **PROOF OF MENTAL CAPACITY OF INFANT.** — On the trial of one accused of murder, who appears to have been about fourteen years of age at the time that the homicide was committed, the testimony of witnesses acquainted with the accused, that he was or was not of bright or quick mind, is admissible. *Martin v. State*, 844.

HUSBAND AND WIFE.

1. **ANTENUPTIAL CONTRACT VALID AND CONCLUSIVE OF RIGHTS OF PARTIES WHEN.** — Where an intended wife, of mature years, of sound mind, of good education, fully capable of protecting herself, under no restraint, and having every opportunity afforded her to inform herself as to the nature and character of the instrument, executes an antenuptial contract, by which, in consideration of the provision therein made for her,

and on a full disclosure of all the facts as to the estate of her intended husband, she releases all her future interest in his estate, such contract must be considered as having embodied in it the real intention of the parties, and to be conclusive of their rights. And the testimony of a single witness to the effect that such intended husband declared his intention to deceive his intended wife is not sufficient proof of fraud to avoid such contract. *Kesler's Estate*, 557.

2. **POST-NUPTIAL SETTLEMENT — CONSIDERATION TO SUPPORT.** — A relinquishment by a wife of an interest in her husband's estate, whether contingent or certain, or of her own estate, or making a charge upon it for her husband's benefit, will constitute a valuable consideration to support a post-nuptial settlement, when there is no badge of fraud. *De Farges v. Ryland*, 659.
3. **VOLUNTARY POST-NUPTIAL SETTLEMENT** is good against subsequent creditors, when there is no fraud, and the settlor is not indebted when he makes it. *De Farges v. Ryland*, 659.
4. **VOLUNTARY POST-NUPTIAL SETTLEMENT, WHEN VOID — EVIDENCE.** — Every voluntary post-nuptial settlement made when the settlor is indebted is fraudulent and void as against his creditors; and every such settlement is deemed voluntary, unless those claiming under it can show that it was made for a valuable consideration. Such consideration cannot be shown by the answer in an action to annul the deed of settlement for fraud, nor by recitals in the deed. *De Farges v. Ryland*, 659.
5. **POST-NUPTIAL SETTLEMENT — EVIDENCE INSUFFICIENT TO SUSTAIN.** — A post-nuptial settlement on the wife of all his property, made by a husband largely indebted, upon a consideration and under an agreement recited in the deed of settlement, is void as to creditors, in the absence of clear and distinct proof, other than the recitals in the deed and the wife's evidence, of a valuable consideration. *De Farges v. Ryland*, 659.
6. **GIFT BY HUSBAND DURING COVERTURE — RIGHT OF WIFE TO ASSAIL, FOR FRAUD.** — A husband may dispose of his personal property by voluntary gift, during the coverture, without his wife's consent, freed from every *post-mortem* claim by her. She cannot, after her husband's death, assail such gift as being in fraud of her rights. *Lines v. Lines*, 487.
7. **FRAUDULENT CONVEYANCE — ESTATE IN ENTIRETY.** — A husband and wife, by jointly purchasing real estate and having it conveyed to them jointly, cannot thus create an estate in entirety at the expense of the husband's creditor, and hold it in fraud of his rights. *Newlove v. Callaghan*, 123.
8. **MARRIED WOMEN — DEEDS OF, MAY BE LEGALIZED.** — The deed of a married woman, executed in good faith, without the concurrence of her husband, may be legalized by statute; and the inchoate right of the husband in land so conveyed may be taken away in like manner. *Wistar v. Foster*, 241.
9. **MARRIED WOMAN'S SIGNATURE TO A NOTE DOES NOT CREATE ANY INDEBTEDNESS AGAINST HER,** unless she had a separate estate or business. *O'Malley v. Ruddy*, 702.
10. **JOINT DEED TO — TENANCY BY ENTIRETY — DIVORCE.** — Under a joint deed to husband and wife, they take by entireties, and the estate thus created, with the right of survivorship, is not destroyed nor affected by divorce of the grantees. *Appeal of Lewis*, 94.
11. **JOINT PURCHASE OF LAND BY — PRESUMPTION.** — Where land is purchased by and conveyed to husband and wife jointly, the husband will

- be presumed to have paid one half the purchase price, in the absence of any showing to the contrary. *Newlove v. Callaghan*, 123.
12. **WIFE BOUND BY CONTRACT MADE BY HER HUSBAND WHEN.** — Where a wife assents to a contract made by her husband for materials to be used in the erection of a building upon her separate estate, and knowingly receives them and assents to their application to her property, she is bound by such contract. *Bodey v. Thackara*, 526.
13. **DEED OF SETTLEMENT AS EVIDENCE.** — Recitals in a deed of post-nuptial settlement are conclusive upon parties claiming under the deed, but are not evidence as against creditors attacking it for fraud. *De Farges v. Ryland*, 659.
14. **AGREEMENT TO RENEW MARITAL RELATIONS FOR MONEY NOT VALID CONSIDERATION.** — Where an intended wife enters into a valid and binding antenuptial contract, and after the marriage voluntarily leaves her husband solely because of her dissatisfaction with such contract, a promise thereupon made by the husband not to revoke a codicil to his will making additional provision for her, provided she should become reconciled with him, resume her marital relations, and abandon legal proceedings instituted by her for the revocation of the antenuptial contract, is without valid consideration, and the subsequent revocation by him of such codicil will not operate as a valid revocation of the antenuptial contract. *Keeler's Estate*, 557.
- See CO-TENANCY, 2; FRAUD, 2; FRAUDULENT CONVEYANCES, 1; HOMESTEAD; JUDGMENTS, 7; MECHANICS' LIENS, 1, 2; WITNESSES, 1.

IMPEACHMENT.

See WITNESSES, 3, 4.

IMPROVEMENTS.

See PARTITION, 5.

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, 11, 12.

INFANTS.

1. **JUDGMENT AGAINST, WITHOUT APPOINTING GUARDIAN AD LITEM.** — A decree *pro confesso* divesting the legal title to land out of infant defendants not represented by guardian *ad litem* is wholly irregular, and must be reversed. *Griffith v. Ventress*, 918.
2. **CRIMINAL LAW — RESPONSIBILITY OF INFANT.** — Between the ages of seven and fourteen years, an infant is *prima facie* incapable of committing a crime amounting to felony; but the presumption may be rebutted by clear proof of sufficient knowledge and capacity. The presumption of incapacity decreases with the increase of years. *Martin v. State*, 844.
3. **CONFESSION OF INFANT AS EVIDENCE.** — When the *corpus delicti* is otherwise shown, a conviction of felony may be had against a defendant under fourteen years of age on his confessions alone, if clearly established, and if it is fully shown that the accused is *doli capax*. *Martin v. State*, 844.

See DEEDS, 7; HOMICIDE, 7; NEGLIGENCE, 11, 17, 18.

INJUNCTIONS.

1. **PUBLIC STREET, BAY-WINDOWS PROJECTING INTO.** — The owner of a lot fronting on a public street cannot maintain an action against another lot-owner to prevent the latter from constructing bay-windows projecting into such street, though such windows may prevent persons on a portion of the sidewalk from seeing the front of the plaintiff's store, and persons in his store from seeing other stores on the same side of the street. *Hay v. Weber*, 737.
2. **CHANGE OF CIRCUMSTANCES AND SURROUNDINGS MAY JUSTIFY REFUSAL TO RESTRAIN VIOLATIONS OF BUILDING RESTRICTIONS.** — An entire change of circumstances and surroundings in the neighborhood of the property, and in the character of the improvements and the purposes to which they are applied, are, it seems, sufficient to justify a chancellor in refusing an injunction to restrain violations of building restrictions. *Orne v. Fridenberg*, 567.
3. **RIGHT TO MANDATORY INJUNCTION LOST BY GROSS LACHES.** — A chancellor does not interfere by way of mandatory injunction, even though the injury is clearly established, where there has been long-continued delay in asserting the right, and a remedy exists at law. A mandatory injunction to restrain the maintenance of buildings upon an adjoining lot, in violation of restrictive covenants in a conveyance thereof, will not, therefore, be granted, where all the buildings complained of have been for many years in full view of the party applying for the injunction. But although he is not entitled to an injunction in such a case, he may still sue at law, and recover damages, if he can show that he has sustained any. *Orne v. Fridenberg*, 567.

See TRADE-MARKS, 6, 7.

INSOLVENCY.

See ATTACHMENT, 3; TRUSTS, 1.

INSTRUCTIONS.

See APPEAL, 4-10; TRIAL, 9-11.

INSURANCE.

1. **CREDITOR MAY LAWFULLY INSURE LIFE OF HIS DEBTOR.** — A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life according to the Carlisle Tables. *Ulrich v. Reinohl*, 534.
2. **INSURANCE OF DEBTOR'S LIFE NOT A WAGER WHEN.** — Where a creditor, in good faith, and upon the entreaty of his debtor, insures the latter, a healthy man of forty-two years of age, in the sum of three thousand dollars, to protect a debt of one hundred dollars, and the evidence shows that if such debtor had lived out his expectancy, the creditor would have been a loser by a considerable sum, such insurance cannot be regarded as a wagering transaction. *Ulrich v. Reinohl*, 534.
3. **EVIDENCE ADMISSIBLE TO SHOW WHETHER INSURANCE OF DEBTOR DISPROPORTIONED TO DEBT.** — In order to determine whether an insurance by a creditor upon the life of his debtor is disproportioned to the debt or not, evidence of such debtor's age, of his expectancy of life, and of the cost of maintaining the policy during that period, is not only proper,

- but essential. And these facts, when put in evidence, are sufficient to carry the case to the jury. *Ulrich v. Reinohl*, 534.
4. **ARBITRATION — PUBLIC POLICY.** — A provision in an insurance policy or other contract requiring all differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, is disregarded as against public policy; but when such provision only requires that the value or quantity of a thing which might be involved in litigation under the contract may be ascertained and determined by arbitration, it does not oust the jurisdiction of the courts, but only exacts a certain character of evidence of a fact in controversy, and is valid. *Randall v. American Fire Ins. Co.*, 50.
 5. **WAIVER OF CONDITION CONCERNING ARBITRATION.** — If insurance adjusters, in making up proofs of loss, without authority include therein the amount of loss, this alone will not constitute a waiver on the part of the insurer of a condition in the policy that the amount of loss shall be ascertained by arbitration before suit; but if the insurer receives such proofs of loss, and retains them, without objection, then the provision concerning arbitration will be deemed to have been waived. *Everett v. London etc. Ins. Co.*, 499.
 6. **ARBITRATION — PROOFS OF LOSS.** — Where an insurance policy provides that upon a failure by the parties to agree upon the amount of loss, the same shall be ascertained by appraisers, and that until their award is permitted and the proof of loss produced, the loss shall not be payable, the retention by the insurer of such proof, containing a statement that the loss was estimated by parties selected by agreement between the insurer and insured, after denouncing such statement as false, in no way prejudices his rights, whether such statement is true or false. *Randall v. American Fire Ins. Co.*, 50.
 7. **ARBITRATION — RIGHT OF ACTION.** — Where an insurance policy provides that upon a failure by the parties to agree upon the amount of loss, the same shall be ascertained by appraisers, and that until the required proofs of loss are produced and the award of the appraisers obtained, the loss shall not be payable, the assured, after his proffered proofs of loss have been rejected by the insurer without a demand for appraisal or objection to the amount of loss as shown by such proofs, may sue for the loss without first showing an appraisal, or that he has offered to have the loss appraised or requested the appointment of appraisers. *Randall v. American Fire Ins. Co.*, 50.
 8. **AGENT — NOTICE TO AGENT AS NOTICE TO PRINCIPAL.** — A clerk employed by an insurance agent without the knowledge of the company, and authorized by such agent to fill out and issue policies, sign the agent's name, and to indorse the rate of insurance on policies, is not the agent of the company so as to charge it with notice of facts of which he has notice. *Wahlman v. North British etc. Ins. Co.*, 883.
 9. **WAIVER OF CONDITION CONCERNING COMMENCEMENT OF ACTION.** — To constitute a waiver by the company of a condition in the policy limiting the time in which suit shall be brought after loss, the act or declaration relied upon must be done or made during the running of the period of limitation. *Everett v. London etc. Ins. Co.*, 499.
 10. **EVIDENCE OF WAIVER OF CONDITION LIMITING TIME OF ACTION.** — Letters written by an insurance company to its agent, denying liability for a loss, but informing him that, to avoid litigation, the company would settle under certain conditions, the contents of which were not

made known to the insured, nor the conditions performed, are not evidence of a waiver by the company of a condition in its policy limiting the time within which suit must be brought. *Everett v. London etc. Ins. Co.*, 499.

11. SUBROGATION. — If A agrees to have the property of B insured against loss by fire, but is guilty of a breach of his agreement, and B himself procures insurance against such loss, after which the property is destroyed by fire, and the insurance paid to B, whereby he is indemnified for all his loss, he has no cause of action against A, because A's breach has done him no damage; nor has the insurance company any claim against A. It cannot be subrogated to any cause of action in favor of B, because he has none. *Lancaster Mills v. Merchants' etc. Co.*, 586.
12. PROOF OF LOSS — INTEREST. — When, by the terms of a policy sued on, the loss is payable sixty days after proof thereof, legal interest upon the amount found due should be allowed from and after the expiration of the sixty days after proof of loss was delivered to the insured and rejected by him. *Randall v. American Fire Ins. Co.*, 50.
13. WAIVER OF CONDITION AGAINST OVER-INSURANCE. — When insurance adjusters report the total amount of insurance, and the proportionate share of the loss to be paid by each of several companies interested, this alone is not a waiver by a company not represented by them of a condition in the policy of such company limiting the amount of insurance; but if such company receives such report showing over-insurance and that it is expected to pay its proportionate share of the adjusted loss, and retains such report without objection, it thereby waives the protection of the condition limiting the amount of insurance to be carried. *Everett v. London etc. Ins. Co.*, 499.
14. WAIVER OF FORFEITURE BY CLERK OF AGENT. — An insurance agent who has power to waive the forfeiture of a policy for additional insurance effected without the consent of the company cannot delegate such authority to his clerk, employed by him to discharge clerical work, and without the knowledge or consent of the company; nor will a waiver of such forfeiture by the clerk be imputed to the company. *Waldman v. North British etc. Ins. Co.*, 883.
15. INSURANCE FOR THE BENEFIT OF A CARRIER UPON GOODS IN ITS CUSTODY, IF NOT LIMITED TO THE INSURANCE OF ITS LIABILITY OR INTEREST, is an insurance of the whole value, and one in which the owner has therefore an interest; and extrinsic evidence is not admissible to control the effect of a policy in this respect, by showing that the insurer and assured intended to insure only the interest or liability of the carrier. *Lancaster Mills v. Merchants' etc. Co.*, 586.
16. EVIDENCE OF VALUE OF GOODS DESTROYED. — Where the receipt and retention of proofs of loss are relied upon as an acquiescence and agreement of the amount thereof, testimony as to the value of the goods destroyed is inadmissible. *Everett v. London etc. Ins. Co.*, 499.
17. EVIDENCE OF VALUE OF GOODS DESTROYED. — Where a policy of insurance provides a specific method of ascertaining the amount of loss, parol evidence as to the value of the goods destroyed is inadmissible. *Everett v. London etc. Ins. Co.*, 499.
18. PAYMENT OF LOSS, WHAT IS. — If, after a loss has been suffered, the insurer pays the assured a sum of money equivalent thereto, but exacts and receives from the latter a writing declaring that he has borrowed such sum as a loan pending an investigation and determination

- but essential. And these facts, when put in evidence, are sufficient to carry the case to the jury. *Ulrich v. Reinohl*, 534.
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18. PAYMENT OF LOSS, WHAT IS. — If, after a loss has been suffered, the insurer pays the assured a sum of money equivalent thereto, but exacts and receives from the latter a writing declaring that he has borrowed such sum as a loan pending an investigation and determination

whether the loss is one for which the carrier should be held liable, and that if the carrier should be so held, the assured agrees to return such sum, when and to the extent it shall be recovered from the carrier, the transaction constitutes a payment of the loss, and not a loan. *Leicester Mills v. Merchants' etc. Co.*, 586.

19. SLIGHT MISTAKE IN ASSESSMENT INSURANCE WILL NOT VITIATE. — Although the precise amount of the assessments necessary to maintain an assessment insurance cannot be ascertained, yet it can be approximated, and where a creditor, in good faith, takes out such a policy on the life of his debtor, a slight mistake in calculating that amount will not vitiate the policy. *Ulrich v. Reinoehl*, 534.

See **BENEVOLENT SOCIETIES**; **CARRIERS**, 6, 7; **CONTRACTS**, 6; **WAREHOUSEMEN**, 3-5.

INTEREST.

See **INSURANCE**, 11.

INTOXICATING LIQUORS.

SOCIAL CLUB—LICENSE. — A social club, incorporated for literary, educational, social, and mutual improvement purposes, and not to evade the liquor laws, and which keeps a stock of liquors, furnished its members only, without profit to itself, is not a retail liquor seller within the meaning of a statute imposing a license on all persons who deal in, sell, or dispose of intoxicating liquors at retail. *Barden v. Montana Club*, 27.

ISLANDS.

See **GRANTS**.

JEOPARDY.

See **JUDGMENTS**, 14, 16.

JOINT LIABILITY.

See **TRESPASS**, 2.

JUDGMENTS.

1. JUDGMENT, WHEN VOID. — When it appears from the whole record that a court has no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in collateral proceedings. *Hope v. Blair*, 366.
2. JURISDICTION. — IN DETERMINING WHETHER A COURT HAD JURISDICTION TO RENDER A JUDGMENT, the whole record must be inspected; and if the judgment itself declares that the defendant, though duly served with process of summons, comes not, but makes default, but the return found in the record shows a service which is insufficient and unauthorized by law, the judgment must be disregarded as void. *Laney v. Garbee*, 391.
3. JURISDICTION, PRESUMPTIONS OF. — THE ORDERS AND JUDGMENTS OF PROBATE COURTS, when acting within their jurisdiction, are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction. *Sherwood v. Baker*, 399.

4. **JURISDICTION. — RECITALS IN A JUDGMENT OF THE SERVICE OF PROCESS** are deemed to refer to the kind of service shown by other parts of the record. *Laney v. Garbee*, 391.
5. **RES JUDICATA.** — The recovery of judgment for taxes provided for by an unconstitutional statute in an action in which the constitutionality of the statute is not brought in question does not estop the party in whose favor the judgment is rendered from setting up the unconstitutionality of the statute in a subsequent action between the same parties upon a different cause of action. *Philadelphia v. Ridge etc. R'y Co.*, 512.
6. **UPON BILL CONFESED**, complainant is not entitled to any relief beyond the fair scope of the allegations and prayer of his bill. *Lancaster Mills v. Merchants' etc. Co.*, 585.
7. **JUDGMENT AGAINST A MARRIED WOMAN** and her husband, establishing and enforcing her alleged liability against her separate estate, when the record shows that she held lands as such estate, is conclusive in a collateral action, and precludes any inquiry in such action as to whether the court erred in law or in fact. *Hope v. Blair*, 366.
8. **MERGER BY AFFIRMANCE — JURISDICTION.** — When the judgment sued on was affirmed on appeal, and the defendant submitted himself to the jurisdiction of the appellate court, he cannot assail it on the ground that the trial court never acquired jurisdiction of his person. This rule applies to affirmed judgments of other states. *Roach v. Privett*, 819.
9. **MERGER — FOREIGN JUDGMENT.** — A judgment appealed from is merged in a judgment of affirmance on appeal. This rule applies in a suit on a judgment of affirmance rendered in another state. *Roach v. Privett*, 819.
10. **JUDGMENT AGAINST DEFENDANT AS A SURVIVING PARTNER IS NOT CONCLUSIVE OF THE EXISTENCE OF THE PARTNERSHIP** against representatives of a decedent who is claimed to have been a partner of the defendant, though the action was commenced against the defendant and the decedent as partners, the death of the decedent having taken place during its pendency. *Van Kleeck v. Hammell*, 183.
11. **UNCERTAINTY IN DESCRIPTION.** — A judgment in ejectment describing the land as "fraction No. 12, a part of the southeast quarter and northeast quarter of section 16, township 4, range 4, containing 34.75 acres," and following the description in the pleadings and verdict, is not void on its face for uncertainty in description. *Carlisle v. Killebrew*, 915.
12. **AMENDMENT OR ANNULMENT OF.** — A court cannot alter, vary, or annul its final judgment after the close of the term at which it was rendered, except to correct clerical errors or omissions, or when the judgment is void on its face, either for want of jurisdiction of the subject-matter or of the parties. *Carlisle v. Killebrew*, 915.
13. **JUDGMENTS RENDERED IN ANOTHER STATE.** — A decree of a court of competent jurisdiction in another state, taken *pro confesso*, in a suit against a corporation, establishing the fact that service of process on two of the directors and the cashier was a sufficient service of process on the corporation, is conclusive in the courts of a sister state, when such decree is offered in evidence, although it may abound in errors and irregularities; but it cannot establish the legal identity of two corporations, when that question was not at issue in that suit. *Semple v. Glenn*, 894.
14. **TWICE IN JEOPARDY.** — A statute declaring that "whenever any judgment in a criminal action shall be removed by writ of error to the

supreme court, and such court shall reverse said judgment because of any defect, illegality, or irregularity in the proceedings in such case subsequent to the rendition of the verdict of the jury therein, it shall be competent for the supreme court either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment," is not unconstitutional, as authorizing the accused to be twice put in jeopardy for the same offense. *McDonald v. State*, 740.

15. **JEOPARDY** is the situation of a prisoner when a trial jury is impaneled and sworn to try the case upon a valid indictment or information, and such jury has been charged with his deliverance. To put him twice in jeopardy, he must again be put upon his trial, before a jury impaneled and sworn, and charged with his deliverance. *McDonald v. State*, 740.
16. **TWICE IN JEOPARDY.** — Re-sentencing a prisoner on the same verdict is not putting him twice in jeopardy for the same offense. *McDonald v. State*, 740.

See **BILLS AND NOTES**, 12; **CORPORATIONS**, 18; **EVIDENCE**, 5; **EXECUTIONS**, 3; **INFANTS**, 1; **SET-OFF**.

JUDICIAL SALES.

JUDICIAL SALE OF LAND IS NOT COMPLETE UNTIL CONFIRMED by the court, and the bid of the purchaser, where the sale is for cash, is not demandable until such confirmation. Where, therefore, a purchaser at such a sale refuses to pay the amount of his bid, and the commissioner thereupon readvertises and resells the land for a lower price, and reports all the facts to the court, which ratifies and approves the resale, no action is maintainable against him by reason of his bid; for he was not in default. Under such circumstances, the sale must be held to have been abandoned before its consummation. *Campe v. Saucier*, 273.

See **EXECUTIONS; EXECUTORS AND ADMINISTRATORS**, 8.

JURISDICTION.

1. **JURISDICTION MAY BE DEFINED** to be the right to adjudicate concerning a subject-matter in a given cause. To constitute this, there are three essentials: 1. The court must have cognizance of the class of cases to which the one adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be in substance and effect within the issue. *Hope v. Blair*, 366.
2. **JURISDICTION OF THE SUBJECT-MATTER OF A SUIT EXISTS** when the court has the right to proceed and determine the controversy or question in issue between the parties, and to grant the relief prayed, and what that controversy or issue is must be determined by the pleadings. *Hope v. Blair*, 366.
3. **JUDGMENT.** — **THE SUBJECT-MATTER OF A SUIT**, when reference is made to matters of jurisdiction, means the nature of the cause of action and the relief sought. *Hope v. Blair*, 366.

See **JUDGMENTS; MARRIAGE AND DIVORCE**, 9; **PROCESS**, 1.

JUSTICES OF THE PEACE.

1. **LIABILITY FOR JUDICIAL ERROR.** — A justice of the peace, acting in good faith and having jurisdiction of the person and of the subject-matter, is not civilly liable in damages for error of judgment in holding an uncon-

stitutional ordinance valid and enforcing it by imprisoning the violator of it. Nor is the officer liable who makes the arrest in such case. *Brooks v. Mangan*, 137.

2. **PLEADINGS** in justices' courts are to be liberally construed, and though informal, where they fairly apprise the defendant of the claim made against him, they are sufficient. *Costello v. Ten Eyck*, 128.

See EVIDENCE, 5; EXECUTIONS, 5.

LACHES.

See ADVERSE POSSESSION, 4; MORTGAGES, 6.

LANDLORD AND TENANT.

1. **TENANCY AT WILL CANNOT BE TERMINATED WITHOUT THE NOTICE** prescribed by the statute. *Huntington v. Parkhurst*, 146.
2. **TENANT AT WILL WHO ABANDONS THE LEASED PREMISES** without justifiable cause, and without giving the notice required by statute, remains liable for their use and occupation. *Huntington v. Parkhurst*, 146.
3. **ONE WHO ENTERS INTO POSSESSION OF LAND UNDER AN AGREEMENT FOR A LEASE**, which is to be reduced to writing according to the terms agreed upon, and who thereafter pays rent for two months and then refuses to execute such lease, nevertheless becomes a tenant either at will or from year to year, and both he and the landlord acquire rights of which neither can be divested without proper notice. *Huntington v. Parkhurst*, 146.
4. **TENANT ENTERING UNDER A VOID LEASE** may be compelled to pay rent for a longer period than he actually occupies, if by paying rent he has become a tenant at will, and he abandons the premises without giving proper notice to his landlord. *Huntington v. Parkhurst*, 146.
5. **LESSOR MAY RE-LEASE PREMISES DEMIED, AND HOLD LESSEE'S ADMINISTRATOR FOR DEFICIT, WHEN.** — Where the administrator of a deceased lessee notifies the lessor of his determination to abandon the leased premises, but the lessor objects to his doing so, and notifies him that he will re-lease the premises for the best rent he can get, and hold the lessee's estate for any deficit that may arise, there is no annulment of the lease, and the lessor may recover from the administrator the amount of such deficit. *Alsop v. Banks*, 294.
6. **TITLE TO PRODUCTS OF LEASED FARM IN LESSEE WHEN.** — Where a farm is leased with stock thereon, in which the landlord and the tenant have a joint interest, the tenant agreeing to raise enough on the farm to feed the stock, and if enough is not raised to buy whatever may be necessary, the title to hay, oats, and straw raised on the farm is in the tenant, and the landlord cannot recover in an action of replevin brought by him against an officer who has levied on such products by virtue of attachments against the tenant. *Colville v. Miles*, 433.

See LEASES; VENDOR AND VENDER, 8.

LARCENY.

1. **SUFFICIENCY OF INDICTMENT.** — An "attempt" implies both an intent and an actual effort to consummate the intent. Hence an indictment charging an "attempt" to commit larceny is sufficient, without alleging the particular acts constituting the "attempt." *Jackson v. State*, 860.
2. **VARIANCE BETWEEN ALLEGATION AND PROOF.** — An indictment charging grand larceny in stealing "one iron-gray horse, a gelding," is not sup-

ported by proof showing the theft of a "horse" or "colt," and the variance is fatal to conviction. *State v. McDonald*, 25.

3. **LARCENY OF LOST PROPERTY.** — Where children have found lost property, and, with no intent to steal it, have delivered it to their father, who took it, knowing that it was lost property, and with the felonious intent to appropriate it to his own use, he is guilty of larceny. In such case, whether or not the father is guilty of larceny must be determined by the same principles which govern in the case of the actual finder. *Allen v. State*, 856.
4. **LARCENY OF LOST GOODS.** — Lost goods are the subject of larceny, and the place where found is immaterial. The owner is not divested of the right of property by its loss at any place, and has, constructively, the right to its possession. *Allen v. State*, 856.
5. **LARCENY OF LOST GOODS.** — The finder of a lost pocket-book containing money and papers, the latter furnishing reasonable means of discovering the owner, is under obligation to use due diligence to discover him, and his failure to do so, and subsequent appropriation of the property to his own use, is larceny. *Allen v. State*, 856.
6. **LARCENY OF LOST GOODS — INTENT.** — Where the finder of lost goods has a criminal intent to convert them to his own use at the time of the finding, and afterwards does so convert them in pursuance of such intent, an idle effort made in the mean time for the ostensible purpose of finding the owner does not purge the taking of its criminality. *Allen v. State*, 856.
7. **LARCENY OF LOST GOODS — INTENT — DUTY TO RESTORE.** — Although the appropriation of lost goods to his own use by the finder is not larceny, when there are no *indicia* indicating the owner, and the finder really believes he cannot be found, yet if at the time of the taking he knew the owner, or had reasonable grounds for believing he could be discovered, it was his duty to hold and restore the goods to the owner. If, instead of so doing, he appropriates them to his own use, excluding the dominion of the owner, it is larceny. Reasonable belief that the owner can be found may result from previous knowledge, or from attending facts, or from facts learned at the time of the finding, or from any marks or *indicia* on the goods furnishing immediate means of ascertaining the owner. *Allen v. State*, 856.
8. **LARCENY OF LOST PROPERTY — INTENT.** — The existence of a criminal intent to commit larceny by the finder of lost property is ascertained by a careful examination of the facts and circumstances preceding, attending, and following the finding; and in order to ascertain the original intent, inquiries may be made as to the manner in which the finder conducted himself with the property, and his existing means of knowing or of ascertaining the owner. *Allen v. State*, 856.
9. **LARCENY OF LOST PROPERTY — INTENT.** — In order to stamp the conduct of the finder of lost chattels with larcenous character, the intent to convert them absolutely to his own use must co-exist with the act of finding. If such intent does not exist at the time of finding, a subsequent concealment or fraudulent appropriation does not constitute larceny. *Allen v. State*, 856.

LEASE.

1. **AGREEMENT GRANTING RIGHT TO QUARRY STONE IN LEASE.** — An agreement granting to a person the sole right to quarry, take, and sell stone

from a tract of land for a term of fifteen years is a lease of the land. But it is not *prima facie* such a lease of wild mountain land as is ordinarily given in the management of such land by an agent appointed for a single year. *Duncan v. Hartman*, 570.

2. **LEASE PRIMA FACIE BEYOND AUTHORITY OF AGENT WHEN.**—A lease made by an agent appointed for a single year, granting to the lessee the exclusive right to quarry, take, and sell stone from a tract of wild mountain land for a term of fifteen years is *prima facie* beyond such agent's authority. But such a lease may be validated by showing a previous course of dealing with the land by the owners and the agent, which gives a construction by the parties themselves to the agent's authority under his written employment. The burden of proving the validity of the lease is, however, upon the lessee, and it is the province of the jury, though the evidence is undisputed, to determine therefrom whether he has met this burden to their satisfaction. *Duncan v. Hartman*, 570.
3. **RATIFICATION OF LEASE BY RECEIVING RENTS.**—Where the owners of land, which a person assuming to act as their agent has leased, received rents under the lease, knowing, or having such notice that they are bound to know, that they came as rents under the lease, this will be evidence of their ratification. *Duncan v. Hartman*, 570.
4. **LEASE INFORMALLY EXECUTED BY AGENT PROTECTS LESSEE FROM BEING TREATED AS TRESPASSER WHEN.**—A lease of land signed by the agent of the owners, merely as agent, which recites the names of the owners as his principals, and purports to be a grant, not in his own right, but as agent, will, if otherwise valid, protect the lessee in possession from being treated as a trespasser. *Duncan v. Hartman*, 570.
5. **LEASE VOID BY THE STATUTE OF FRAUDS MAY BE REFERRED TO AS SHOWING THE INTENTION OF THE PARTIES,** and it has been generally held that if the tenant enters and occupies the property, the agreement may be looked to as showing the terms under which the tenancy subsisted in all respects, except as to the duration of the term. *Huntington v. Parkhurst*, 146.
6. **LEASE IS NOT TERMINATED BY DEATH OF LESSEE WHEN.**—A lease of land, the execution of which was not with reference to a business which could not be carried on without the personal presence of the lessee, is not terminated by his death, but his estate is liable for the rent during the entire term. *Aloup v. Banks*, 294.

LEX LOCI CONTRACTUS.

See **BILLS AND NOTES**, 21.

LEX FORI.

See **BILLS AND NOTES**, 21.

LIBEL.

1. **PRIVILEGED COMMUNICATION, WHAT QUESTIONS ARE FOR THE COURT AND WHAT FOR THE JURY.**—It is for the court to determine whether the subject-matter to which the alleged libel relates, the interest in it of the author, or his relations to it, are such as to furnish an excuse; but the question of good faith, belief in the truth of the statements, and the existence of actual malice must be submitted to the jury. *Rude v. Nass*, 717.

2. **A COMMUNICATION IS PRIVILEGED**, though made by one who has no interest therein, and no duty to perform in making it, if made to one having an interest in and a right to know and act upon the facts stated. If a person is so situated that it becomes right, in the interests of society, that he tell a third person the facts, then if he, *bona fide* and without malice, tells them, it is a privileged communication. *Rude v. Nass*, 717.
3. **PRIVILEGED COMMUNICATION.** — If a man is accused of seduction, and a friend of the father of the girl alleged to have been seduced, at the instance of the father, writes to a clergyman, who has been acquainted with the accused, for an account of his conduct while the clergyman knew him, and the latter gives such account in good faith and without malice, it is privileged, and not libelous, and no recovery can be had therefor. *Rude v. Nass*, 717.

LICENSE

See EVIDENCE, 3; INTOXICATING LIQUORS.

LIENS.

See ATTACHMENT, 5; BANKS AND BANKING, 5; MECHANICS' LIENS.

LIMITATIONS OF ACTIONS.

1. **THOUGH A DEMAND IS NECESSARY TO GIVE A RIGHT OF ACTION**, the general rule is, that such demand must be made within the period prescribed by the statute of limitations. *Landis v. Saxton*, 403.
2. **STATUTE OF LIMITATIONS, WHEN BEGINS TO RUN IN FAVOR OF SURETIES OF ADMINISTRATOR.** — Where an administrator dies, and his administrator files an account of his intestate's administration, and a decree is made, showing a balance due the estate, in a suit by the distributees against the sureties on the bond of the first administrator, the statute of limitations begins to run from the date of the decree, and not from the death of the administrator. *Williams v. State*, 297.
3. **TRUSTS.** — The trusts against which the statute does not run are those technical and continuing trusts not cognizable at law, and falling within the proper, peculiar, and exclusive jurisdiction of courts of equity; but such other trusts as may be the ground of an action at law are subject to the operation of the statute. *Landis v. Saxton*, 403.
4. **AN ACTION AGAINST THE FORMER SECRETARY AND TREASURER OF AN EXTINGUISHED CORPORATION** by its surviving director for an accounting and payment of moneys received during its existence is subject to the operation of the statute of limitations, and is not protected from that statute on the ground that the action is to enforce a trust. The cause of action must be regarded as arising upon the dissolution of the corporation. *Landis v. Saxton*, 403.
5. **IN A SUIT IN EQUITY AGAINST THE WIDOW AND HEIRS OF A DECEDENT** by a purchaser of his real property at a probate sale, to whom the administrator has made no conveyance, to have the legal title vested in such purchaser, the statute of limitations applicable to real actions should be applied, and not that applicable to personal actions. *Sherwood v. Baker*, 399.
6. **NEW PROMISE — AGREEMENT TO ARBITRATE.** — Where a debtor claims an over-payment to his creditor by mistake, in a transaction occurring eighteen years before, and declares that he will have an account stated

between them by a third party, whereupon the creditor, denying the over-payment, states that he would as "lief" have such third party examine the account as any one, and that if he owed the original debtor anything, he would pay him, such conditional promise by the creditor is insufficient as a submission to arbitration, or as a compromise of disputed rights, or as an acknowledgment of indebtedness sufficient to toll the bar of the statute of limitations. *Linderman v. Pomeroy*, 494.

See CORPORATIONS, 11, 31-34; EJECTMENT, 2; INSURANCE, 8, 9.

LIQUOR-SELLING.

See HABEAS CORPUS, 1; INTOXICATING LIQUORS.

LIS PENDENS.

1. THE EFFECT OF THE NOTICE OF THE PENDENCY OF A SUIT, DULY FILED AND RECORDED, IS LIMITED TO THE ACTION IN WHICH IT IS FILED; and if that action is dismissed, such notice does not affect any subsequent purchaser, nor charge him with knowledge of anything stated therein. *Trentor v. Pothan*, 225.
2. THE FILING OF A NOTICE of the pendency of an action gives constructive notice from the date of such filing, and one who thereafter purchases property which is subject to the action cannot be regarded as an innocent purchaser. *Hope v. Blair*, 366.

LOST INSTRUMENTS.

See BILLS AND NOTES, 27.

LOST PROPERTY.

See LARCENY, 3-9.

MANDAMUS.

See INJUNCTION, 3; RECORDS.

MARRIAGE AND DIVORCE.

1. MARRIAGE AFTER SUPPOSED DEATH OF HUSBAND. — Where a woman, acting upon reliable information that her former husband is dead, marries again, the marriage is legal, in the absence of evidence that the former husband is alive; especially is this so after the lapse of many years. *Sneathen v. Sneathen*, 326.
2. MARRIAGE CONTRACTED WHILE A PREVIOUS MARRIAGE OF THE HUSBAND REMAINS UNANNULLED, though he had previously obtained a void decree of divorce in another state, has no legal force whatever. *Collins v. Voorhees*, 412.
3. A VALID MARRIAGE WILL NOT BE PRESUMED TO HAVE TAKEN PLACE BETWEEN PARTIES WHO LIVED TOGETHER AS HUSBAND AND WIFE under a ceremony of marriage, when the man intended to deceive the wife by a pretended marriage, and knew that he was not competent to marry, because the decree purporting to divorce him from his wife was a nullity, although the parties to the second marriage continued to live together as husband and wife after the first wife had procured a valid divorce from the husband, and therefore after he had capacity to contract a valid marriage. *Collins v. Voorhees*, 412.
4. DEFENDANT NOT ESTOPPED FROM QUESTIONING JUDGMENT FOR ALIMONY AND COSTS WHEN. — A defendant in a divorce suit, against whom a judg-

- ment for alimony and costs has been rendered upon constructive service of process, is not estopped by his subsequent marriage, and a motion on his part to modify the decree in one particular not affecting the alimony and costs, from questioning the right of the court to render the judgment for alimony and costs. *Rigney v. Rigney*, 462.
5. **DIVORCE. — IMPOTENCY** means, in the law of divorce, incurable incapacity, admitting neither of copulation nor procreation. *Payne v. Payne*, 240.
 6. **DIVORCE — SUFFICIENT FINDING OF IMPOTENCY.** — A finding in an action for divorce that one of the parties is "impotent" is a complete and sufficient finding upon the issue of impotency, and implies and includes every element essential as a ground for divorce. *Payne v. Payne*, 240.
 7. **SUIT FOR DIVORCE IS, AS TO ALIMONY AND COSTS, PROCEEDING IN PERSONAM.** — Although a suit for a divorce is in the nature of a proceeding *in rem*, or *quasi in rem*, in so far as it affects the marital status of the parties, as to alimony and costs it is a proceeding *in personam*. *Rigney v. Rigney*, 462.
 8. **DECREE FOR ALIMONY AND COSTS RENDERED UPON CONSTRUCTIVE SERVICE OF PROCESS NOT BINDING.** — A provision in a decree of divorce awarding alimony and costs against a non-resident defendant, who was not served with process within the jurisdiction, and did not appear in the action, does not bind him, although the decree, so far as it affects the marital status of the plaintiff, is valid. *Rigney v. Rigney*, 462.
 9. **JURISDICTION OF COURT OF ANOTHER STATE TO DECREE COSTS AND ALIMONY MAY BE INQUIRED INTO WHEN.** — The jurisdiction of a court of another state to render a judgment against a defendant for costs and alimony in an action for divorce may be inquired into by the courts of New York. *Rigney v. Rigney*, 462.

MARRIED WOMEN.

See HUSBAND AND WIFE; STATUTES, &c.

MASTER AND SERVANT.

1. **LOT-OWNER'S LIABILITY FOR WALL FALLING, THROUGH NEGLIGENCE.** — If the owner of a lot procures a contractor to enter thereon for the purpose of removing a wall, which through the negligence of the contractor is caused to fall upon and injure the adjacent premises, the lot-owner is liable for the damages thus occasioned. *Dillon v. Hunt*, 374.
2. **IF THERE ARE INCREASED PERILS IN A BUSINESS BY REASON OF THE USE OF DEFECTIVE APPLIANCES, OR OTHERWISE, KNOWN TO THE MASTER, OR FOR WHICH HE IS RESPONSIBLE, AND UNKNOWN TO THE SERVANT, IF THE LATTER IS INJURED THEREBY, AND IS FREE FROM NEGLIGENCE, THE MASTER IS LIABLE.** *Johnson v. First Nat. Bank*, 722.
3. **THE MASTER'S DUTY REQUIRES HIM TO USE REASONABLE DILIGENCE IN SEEING THAT THE PLACE WHERE HIS SERVANTS WORK IS SAFE, AND HE IS ANSWERABLE IF HE DIRECTS THE SERVANT TO WORK IN A PLACE WHICH THE MASTER KNEW, OR OUGHT TO HAVE KNOWN, WAS UNSAFE, IF THE SERVANT, BEING WITHOUT NEGLIGENCE, IS INJURED, THOUGH THE NEGLIGENCE OF A FELLOW-SERVANT MAY HAVE CONTRIBUTED TO THE INJURY.** *Johnson v. First Nat. Bank*, 722.

4. **NEGLIGENCE — DEFECTIVE MACHINERY — ASSUMPTION OF RISKS.** — Where a servant, having the right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances made that the danger shall be removed, the duty to remove it is manifest and imperative, and the master is not in the exercise of ordinary care, but is liable for his negligence, unless he makes his assurances good. When such assurances are made, the servant, by continuing in the employment, does not assume its risks. *Roux v. Blodgett etc. L. Co.*, 102.
5. **SERVANT'S RIGHT TO RELY ON SUPERIOR KNOWLEDGE OF MASTER.** — Master and servant do not stand upon equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has a right to rely upon the superior knowledge and skill of the master, and is not entirely free to act upon his own suspicions of danger. *Shortell v. St. Joseph*, 317.
6. **SUPERIOR KNOWLEDGE OF MASTER.— NEGLIGENCE OF SERVANT.** — When the master orders the servant into a place of danger, and the latter, by obeying, is injured, he is not guilty of contributory negligence, so as to bar a recovery, except when the danger is so glaring and obvious that a reasonably prudent man would have disobeyed, and not have entered into it. *Shortell v. St. Joseph*, 317.
7. **CONTRIBUTORY NEGLIGENCE — USE OF DEFECTIVE INSTRUMENTALITIES.** — Though one person owes another the duty of furnishing him with reasonably safe instrumentalities for his use, yet if the latter, knowing, either from information, observation, or any other source, that those furnished are defective and dangerous, continues to use them without any promise that they will be repaired, he assumes the risk of injury therefrom, and in case of injury, is guilty of contributory negligence, which will defeat a recovery. *Roddy v. Missouri P. Ry Co.*, 333.
8. **THE NEGLIGENCE OF A FELLOW-SERVANT CONTRIBUTING TO THE INJURY OF PLAINTIFF** will not preclude his recovery of his master for such injury, if it was caused by the master's requiring the servant to work in a place which the master knew, or ought to have known, was not safe. *Johnson v. First Nat. Bank*, 722.
9. **VICE-PRINCIPALS.** — If a corporation employs a superintendent and foreman in the construction of a building, who employ and discharge workmen, and direct them what to do, such superintendent and foreman are vice-principals in respect to their employers. *Johnson v. First Nat. Bank*, 722.
10. **IF A CORPORATION, THROUGH ITS AGENTS AND EMPLOYEES, THROWS SNOW AND OTHER MATTER UPON A SHED,** and suffers it to remain there until, from this additional weight, the shed falls upon and injures a common laborer, whose duty it was to work therein, and who had no knowledge of the burden which had been placed on the shed, he is entitled to recover of the corporation for the injuries sustained. *Johnson v. First Nat. Bank*, 722.
11. **INDEPENDENT CONTRACTOR, LIABILITY FOR NEGLIGENCE OF.** — If a proprietor undertakes to do upon his lot that which is dangerous in its nature to adjacent proprietors, he must use reasonable care to prevent the doing of an injury to them, whether he does the work himself or procures it to be done by an independent contractor. *Dillon v. Hunt*, 374.
12. **NEGLIGENCE — INDEPENDENT CONTRACTOR.** — An employer is not responsible for the negligence of the contractor or his servants, when the

contractor is given entire freedom in the use of means to accomplish the result; but when the employer reserves the right in any particular to direct the manner of the performance of the work, or undertakes to provide any of the instrumentalities, he owes the contractor and his servants the duty of care in respect to those matters over which he retains control, and those duties which he undertakes to perform. *Roddy v. Missouri P. Ry Co.*, 333.

See RAILROAD COMPANIES.

MECHANICS' LIENS.

1. **MECHANIC'S LIEN ON WIFE'S SEPARATE ESTATE UNDER CONTRACT SIGNED BY HUSBAND ALONE.** — The separate property of a married woman may be charged with a mechanic's lien for materials for the erection of a building thereon, although the contract under which they were furnished is signed by her husband alone, where it is shown that she examined the plans for the building, that the materials were furnished by the claimant with her knowledge and consent, that they were reasonably necessary for the improvement of the property, and were used for that purpose, and that she was frequently upon the premises during the progress of the work, giving directions as to the materials and as to the manner of construction. *Bodey v. Thackara*, 526.
2. **MECHANIC'S LIEN ON WIFE'S REAL ESTATE UNDER CONTRACT MADE BY HER HUSBAND WITH HER KNOWLEDGE AND CONSENT.** — A building, necessary for the improvement of the separate estate of a wife, erected thereon under a contract made by her husband alone, but with her knowledge and consent, is subject to a mechanic's lien for materials reasonably necessary for its erection, furnished upon the order of the contractor, and used in the construction. *Bevan v. Thackara*, 529.
3. **CLAIM OF MECHANIC'S LIEN FOR MATERIALS FOR DWELLING DOES NOT JUSTIFY RECOVERY FOR MATERIALS FOR STABLE.** — Where materials are supplied by a material-man for a dwelling and a stable on the same lot of land, a claim for materials furnished for the dwelling, but not including the stable, will not authorize a recovery for the materials furnished for the stable, even though it is appurtenant to the dwelling, and necessary for the convenient enjoyment of the house and lot. And the mere mention of the stable, in the caption of the bill of particulars appended to the claim, is not a sufficient inclusion of the stable in the claim. *Bevan v. Thackara*, 529.
4. **EVIDENCE ADMISSIBLE IN ACTION ON MECHANIC'S LIEN.** — Where, in *scire facias sur* mechanic's lien, brought by a subcontractor, it appears that the original contract, though signed by the husband alone, was assented to by the wife, and that the materials were furnished for and used in the improvement of her separate estate, the original contract and the claimant's books of original entry charging the husband with the materials for which the claim is made, are admissible in evidence. But evidence that the defendant paid the contract price in full to the original contractor is not admissible. *Bodey v. Thackara*, 526.

MERGER.

See JUDGMENTS, 8, 9.

MINERALS.

See MINES AND MINING.

MINES AND MINING.

1. **SURFACE OF LAND AND MINERALS BENEATH IT DISSEVERABLE IN TITLE.** — The surface of land and the minerals beneath it may be dissevered in title and become separate tenements. The mineral, when properly severed from the surface, becomes a separate corporeal hereditament, and its ownership is attended with all the attributes and incidents peculiar to the ownership of land. *Lillibridge v. Lackawanna etc. Co.*, 544.
2. **TITLE BY EXCEPTION OUT OF GRANT NOT ESSENTIALLY DIFFERENT FROM TITLE BY DIRECT GRANT OF SAME SUBJECT.** — There is no substantial difference between a title by exception out of a grant and a title by direct grant of the same subject. A grant of all the coal underneath a tract of land is an absolute conveyance in fee-simple of all the coal, and no greater title than that can be acquired by an exception to the same effect in a grant of the surface. *Lillibridge v. Lackawanna etc. Co.*, 544.
3. **CHAMBER CUT THROUGH COAL IN MINE BELONGS TO OWNER OF COAL.** — The chamber or passage formed by mining coal is the property of the owner of the coal; and where the ownership of the surface of the land has been severed from the ownership of the coal, the owner of the surface cannot restrain the owner of the coal from making such use of such chamber as he may see fit, so long as such use does not injure the former. The right to use such chamber is exclusively in the owner of the coal, and cannot be questioned by the owner of the surface. *Lillibridge v. Lackawanna etc. Co.*, 544.
4. **INSTRUMENT CREATES FEE-SIMPLE ESTATE IN COAL BENEATH SURFACE OF LAND WHEN.** — An instrument which grants, demises, leases, and to mine-lets to a party all the merchantable coal under a certain tract of land, together with the sole and exclusive right to mine and remove the same, to have and to hold the coal until the exhaustion thereof under the terms of the indenture, creates in him an estate in fee-simple to the coal. *Lillibridge v. Lackawanna etc. Co.*, 544.

MISTAKE.

See ADVERSE POSSESSION, 3; INSURANCE, 18.

MORTGAGES.

1. **TAX TITLE ACQUIRED BY MORTGAGEE** in possession will not prevail against the mortgagor or his devisee. *Howze v. Dew*, 783.
2. **TENDER OF PART OF MORTGAGE DEBT NOT AVAILABLE UNLESS KEPT GOOD WHEN.** — Where a mortgagee covenants to release a portion of the mortgaged premises upon payment of a specified part of the sum secured by the mortgage, a tender of the amount specified is not available in a suit to foreclose the mortgage, unless the tender is kept good and the money paid into court. Where such tender is made for the purpose of basing upon it a demand for affirmative relief, the principle that he who seeks equity must do equity compels the mortgagor to keep the tender good, before it will allow him to maintain a suit to destroy the lien of the mortgage on account of a tender and refusal. *Werner v. Tuck*, 443.
3. **FORECLOSURE UNDER POWER — INNOCENT PURCHASER.** — Where a mortgage containing a power of sale has been in fact discharged, it is the duty of the mortgagor or owner of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of

the discharge to be properly put upon record. A failure to do this leaves the mortgagee apparently clothed with power to foreclose; and upon foreclosure under such apparent authority, an innocent purchaser, if his evidence of title is first recorded, will be protected. As between him and the mortgagor, the latter is bound by the record. *Bausman v. Eads*, 201.

4. **FORECLOSURE UNDER POWER — HEIR ESTOPPED BY NEGLECT OF ANCESTOR.** — Where an ancestor neglects for eight years to question the validity of a foreclosure sale under a power in a mortgage, which sale appears by the record to be valid, his heir is estopped to question its validity, as against an innocent purchaser for value, after the death of the ancestor. *Bausman v. Eads*, 201.

5. **FORECLOSURE OF MORTGAGE, ADVERSE CLAIMS OF TITLE.** — One who is made a party defendant to a suit to foreclose a mortgage, under an allegation that he claims some interest in or lien upon the mortgaged premises, may, by his answer, set up a paramount claim to such premises, and such claim may be tried and determined in that suit. The only way in which the plaintiff can avoid the trial of the claim is by discontinuing his action as to such defendant. *Lego v. Medley*, 706.

6. **LIMIT FOR REDEMPTION — LACHES.** — A suit by the mortgagor against the mortgagee in possession, to redeem and for an accounting, is not barred until the expiration of ten years from the time of taking possession; and until the expiration of such time, no question of laches, delay, or acquiescence can arise against the mortgagor. *Waldrop v. Friedman*, 775.

See **ACKNOWLEDGMENTS; CHATTEL MORTGAGES; CO-TENANCY, 1; EXECUTIONS, 6; FRAUD, 2; HOMESTEAD; VENDOR AND VENDEE, 10.**

MUNICIPAL CORPORATIONS.

1. **ORDINANCE.** — Constitutional provisions relating to the title of laws passed by the legislature do not apply to city ordinances. *People v. Wagner*, 141.

2. **MUNICIPAL CORPORATION'S POWER TO ENACT QUARANTINE ORDINANCES.** — A municipal corporation has no power to establish and enforce quarantine regulations, when such power is not expressly nor impliedly granted, nor incident to any power granted in its charter, or essential to the declared objects and purposes of the corporation. Hence it is not liable for compensation to an officer employed by it to enforce such regulations. *New Decatur v. Berry*, 827.

3. **MUNICIPAL ORDINANCE PROHIBITING SALE OF SECOND-HAND CLOTHING VOID WHEN.** — An ordinance of a town declaring it unlawful for any person to bring into, or to offer for sale therein, second-hand clothing, without having first produced satisfactory proof to the mayor that such clothing did not come from a district or locality in which contagion or infection was prevailing or had prevailed, is, in the absence of any epidemic or of other circumstances apparently rendering it necessary for the preservation of the public health, clearly an unreasonable and unjust interference with a recognized and legitimate business pursuit, in restraint of trade, and therefore void. *Town of Kosciusko v. Slomberg*, 281.

4. **ORDINANCE REGULATING WEIGHT OF BREAD LOAVES.** — An ordinance providing that all bread of every description manufactured by the bakers of the city shall be made into loaves of one, two, and four

pounds, and no other avoirdupois weight, and that no baker shall make for sale, or shall sell, or expose for sale, any bread that shall be deficient in weight, but not attempting to fix the price of bread, is valid, and within the provisions of a charter empowering the common council to "direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." *People v. Wagner*, 141.

6. **ORDINANCE — REASONABLENESS — RESTRAINT OF TRADE — DISCRIMINATION.** — A municipal ordinance requiring a hawker or peddler who travels on foot to pay a license of ten dollars for the first day and five dollars for each subsequent day, and if traveling with one horse, twenty dollars and fifteen dollars, and if traveling with two or more horses, twenty-five dollars and fifteen dollars, for the first and all subsequent days, is invalid, as unreasonable and in restraint of trade, and as discriminating between residents and non-residents of the city. *Brooks v. Mangan*, 137.

7. **CITY ORDINANCE PROHIBITING CANVASSING WITHOUT LICENSE VALID EXERCISE OF POLICE POWER.** — A city ordinance, enacted by legislative authority, forbidding any person to engage in the business of canvassing or soliciting within the city for orders for goods, books, paintings, wares, or merchandise of any kind, without first obtaining a license from the mayor, upon payment of certain fees therefor, and imposing a penalty for its violation, is a valid exercise of the police power of the state. And if such ordinance is equal and uniform in its operation, and does not discriminate between citizens of the different states, it is not in violation of the interstate commerce clause of the federal constitution. *City of Titusville v. Brennan*, 580.

See TELEGRAPH COMPANIES, 1.

NEGLIGENCE.

1. **ACTIONABLE NEGLIGENCE** CONSISTS in the breach or non performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby. *Roddy v. Missouri P. Ry Co.*, 333.

2. **NEGLIGENCE, CONCURRENT, OF TELEPHONE AND ELECTRIC RAILWAY COMPANY.** — While it is primarily the duty of a telephone company to see that its wires are in a reasonably safe and sound condition, and protected against the contingency of falling, it is also the duty of an electric company using a trolley-wire to protect it from the same contingencies; and if, through the negligence of the telephone company, one of its wires falls across the trolley-wire of an electric company, and because of the latter being unguarded, the telephone wire conducts a current of electricity from it, whereby a horse coming in contact with the wire is killed, both companies are answerable to the owner of the animal, because the negligence of both concurred in inflicting the injury. *Electric Ry Co. v. Shelton*, 614.

3. **LIABILITY FOR RESULTING INJURY.** — One guilty of negligence is liable for whatever consequences result therefrom without the intervention of some independent agency disconnected from the primary fault, and self-operating; and this although in advance the actual result of the primary negligence may have seemed improbable. *Quigley v. Delaware etc. Canal Co.*, 504.

4. **EVIDENCE TO PROVE.** — In an action to recover for personal injury received in a railroad accident, alleged to have been caused by the rotten

- condition of a trestle and by the overloading of an old and rotten car with guano, a witness who has handled such fertilizer for several years, and has testified to the weight of sacks, filled with it, may also testify to the dimensions of such sacks, as bearing on the question of negligence in overloading the car. *Kansas City etc. R. R. Co. v. Smith*, 753.
6. **BURDEN OF PROOF.** — A party suing to recover for an injury caused by the negligence of another has the burden of proof to show the negligence, and that it was the proximate cause of the injury. *Birmingham etc. R'y Co. v. Hale*, 748.
 6. **NEGLIGENCE IS NOT PRESUMED FROM THE DESTRUCTION OF GOODS BY FIRE** while in the hands of a bailee for hire, and if the bailor seeks to recover of the bailee on account of the latter's negligence, he must allege and prove it. *Lancaster Mills v. Merchants' etc. Co.*, 586.
 7. **PRESUMPTION OF — ACCIDENT.** — Mere proof of injury does not raise a presumption of negligence against the accused sufficient to impose on him the burden to prove due care on his part. In order to recover, plaintiff must show an accident from which the injury resulted, or circumstances of such character as impute negligence. *Birmingham etc. R'y Co. v. Hale*, 748.
 8. **NEGLIGENCE IS NOT PRESUMED FROM FACT OF ACCIDENT.** — There must have existed, before its occurrence, some suggestion of danger, in order to create liability for negligence. *Werbowsky v. Fort Wayne etc. R'y Co.*, 120.
 9. **NEGLIGENCE PRESUMED FROM ACCIDENT.** — **PROOF OF SUDDEN STARTING OF HORSE-CAR** while a passenger is in the act of alighting, alleged to be the cause of injury, establishes a *prima facie* case of negligence, and the burden to disprove it is then cast on the horse-car company. *Birmingham etc. R'y Co. v. Hale*, 748.
 10. **WHEN A QUESTION FOR JURY.** — When the complaint in an action is founded on negligence, and the evidence tends to sustain the allegations, the question of the negligence of defendant and of the contributory negligence of plaintiff is properly left to the jury. *Kansas City etc. R. R. Co. v. Smith*, 753.
 11. **QUESTION OF DEFENDANT'S NEGLIGENCE FOR JURY TO DETERMINE WHEN.** — Where a child four years old is run over and injured on a public street by a heavy team and wagon moving down grade at a rapid gait, the driver thereof being asleep at the time, it is a question for the jury to determine whether the driver's negligence caused the injury. *Summers Bergner etc. Co.*, 518.
 12. **CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.** — In a case involving contributory negligence, if upon all the facts and circumstances fair and sensible men may differ in their conclusions, the question should be left to the jury, even though there is no dispute as to the facts. *Roddy v. Missouri P. R'y Co.*, 333.
 13. **CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.** — In a case involving a question of contributory negligence, where two reasonable and different views may be taken, and men of equal candor may differ as to the liability, the question should be submitted to the jury. *Ross v. Blodgett etc. L. Co.*, 102.
 14. **CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY.** — In a case involving the question of contributory negligence, upon which the evidence is conflicting, it should be left to the jury to determine. *Moon v. Northern P. R. R. Co.*, 195.

15. **CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE COURT.**—When no other inference than that of negligence can be fairly and reasonably drawn from the evidence, it should be declared by the court as a matter of law. *Corcoran v. St. Louis etc. R'y Co.*, 394.
 16. **CONTRIBUTORY NEGLIGENCE, WHEN PRECLUDES REDRESS.**—Notwithstanding the negligence of the defendant, if the plaintiff was also negligent, which the defendant did not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery. *Corcoran v. St. Louis etc. R'y Co.*, 394.
 17. **CHILD FOUR YEARS OLD CANNOT BE HELD RESPONSIBLE FOR CONTRIBUTORY NEGLIGENCE.** *Summers v. Bergner etc. Co.*, 518.
 18. **NEGLIGENCE OR RASHNESS OF CHILD CANNOT BE ASSUMED WHEN.**—Where a child four years old is run over by a team and wagon on a public street, in the absence of anything to indicate that she ran hastily or impulsively under the horses or the wagon, it cannot be presumed that she did so; nor can it be assumed that she was a trespasser, or that her actions were negligent or rash, merely because her evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on the point, the reasonable inference is, that she was run over while crossing or playing in the street. *Summers v. Bergner etc. Co.*, 518.
 19. **STATUTE GIVING CAUSE OF ACTION—EXTRATERRITORIAL EFFECT—PARTIES.**—Where a statute of one state gives a cause of action to the "personal representative" of a person killed by a wrongful act, the widow of one so killed in that state cannot maintain an action in her private capacity under such statute in another state, although under the laws of the latter she could have maintained an action if the accident had happened there, and although no administrator could be appointed in the state where the deceased was killed, because he left no estate there. *Oates v. Union etc. R'y Co.*, 348.
- See BAILMENT, 1; CARRIERS; CONTRACTS, 4, 5; MASTER AND SERVANT; RAILROAD COMPANIES.**

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES; BILLS OF LADING.

NOTICE.

See AGENCY, 2; ATTORNEY AND CLIENT; CHATTEL MORTGAGE, 1; CONTRACTS, 8; CORPORATIONS, 40; CO-TENANCY, 6; LIS PENDENS; VENDOR AND VENDEE, 10, 11.

NUISANCES.

PUBLIC NUISANCE.—BEFORE A PRIVATE PERSON CAN SUSTAIN AN ACTION ON ACCOUNT OF A PUBLIC NUISANCE, he must show that the damage suffered by him differs from that suffered by the public, in kind as well as in degree. Therefore he cannot maintain an action for obstructing a public street, when his only special damage is, that in driving to and from his garden he is compelled to take a more inconvenient and circuitous route. *Zettel v. West Bend*, 715.

See INJUNCTIONS, 1.

- condition of a trestle and by the overloading of an old and rotten car with guano, a witness who has handled such fertilizer for several years, and has testified to the weight of sacks, filled with it, may also testify to the dimensions of such sacks, as bearing on the question of negligence in overloading the car. *Kansas City etc. R. R. Co. v. Smith*, 753.
6. **BURDEN OF PROOF.** — A party suing to recover for an injury caused by the negligence of another has the burden of proof to show the negligence, and that it was the proximate cause of the injury. *Birmingham etc. R'y Co. v. Hale*, 748.
 6. **NEGLIGENCE IS NOT PRESUMED FROM THE DESTRUCTION OF GOODS BY FIRE** while in the hands of a bailee for hire, and if the bailor seeks to recover of the bailee on account of the latter's negligence, he must allege and prove it. *Lancaster Mills v. Merchants' etc. Co.*, 586.
 7. **PRESUMPTION OF — ACCIDENT.** — Mere proof of injury does not raise a presumption of negligence against the accused sufficient to impose on him the burden to prove due care on his part. In order to recover, plaintiff must show an accident from which the injury resulted, or circumstances of such character as impute negligence. *Birmingham etc. R'y Co. v. Hale*, 748.
 8. **NEGLIGENCE IS NOT PRESUMED FROM FACT OF ACCIDENT.** — There must have existed, before its occurrence, some suggestion of danger, in order to create liability for negligence. *Werbowsky v. Fort Wayne etc. R'y Co.*, 120.
 9. **NEGLIGENCE PRESUMED FROM ACCIDENT.** — **PROOF OF SUDDEN STARTING OF HORSE-CAR** while a passenger is in the act of alighting, alleged to be the cause of injury, establishes a *prima facie* case of negligence, and the burden to disprove it is then cast on the horse-car company. *Birmingham etc. R'y Co. v. Hale*, 748.
 10. **WHEN A QUESTION FOR JURY.** — When the complaint in an action is founded on negligence, and the evidence tends to sustain the allegations, the question of the negligence of defendant and of the contributory negligence of plaintiff is properly left to the jury. *Kansas City etc. R. R. Co. v. Smith*, 753.
 11. **QUESTION OF DEFENDANT'S NEGLIGENCE FOR JURY TO DETERMINE WHEN.** — Where a child four years old is run over and injured on a public street by a heavy team and wagon moving down grade at a rapid gait, the driver thereof being asleep at the time, it is a question for the jury to determine whether the driver's negligence caused the injury. *Summers Bergner etc. Co.*, 518.
 12. **CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.** — In a case involving contributory negligence, if upon all the facts and circumstances fair and sensible men may differ in their conclusions, the question should be left to the jury, even though there is no dispute as to the facts. *Roddy v. Missouri P. R'y Co.*, 333.
 13. **CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.** — In a case involving a question of contributory negligence, where two reasonable and different views may be taken, and men of equal candor may differ as to the liability, the question should be submitted to the jury. *Ross v. Blodgett etc. L. Co.*, 102.
 14. **CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY.** — In a case involving the question of contributory negligence, upon which the evidence is conflicting, it should be left to the jury to determine. *Moon v. Northern P. R. R. Co.*, 195.

15. **CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE COURT.**— When no other inference than that of negligence can be fairly and reasonably drawn from the evidence, it should be declared by the court as a matter of law. *Corcoran v. St. Louis etc. R'y Co.*, 394.
 16. **CONTRIBUTORY NEGLIGENCE, WHEN PRECLUDES REDRESS.**— Notwithstanding the negligence of the defendant, if the plaintiff was also negligent, which the defendant did not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery. *Corcoran v. St. Louis etc. R'y Co.*, 394.
 17. **CHILD FOUR YEARS OLD CANNOT BE HELD RESPONSIBLE FOR CONTRIBUTORY NEGLIGENCE.** *Summers v. Bergner etc. Co.*, 518.
 18. **NEGLIGENCE OR RASHNESS OF CHILD CANNOT BE ASSUMED WHEN.**— Where a child four years old is run over by a team and wagon on a public street, in the absence of anything to indicate that she ran hastily or impulsively under the horses or the wagon, it cannot be presumed that she did so; nor can it be assumed that she was a trespasser, or that her actions were negligent or rash, merely because her evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on the point, the reasonable inference is, that she was run over while crossing or playing in the street. *Summers v. Bergner etc. Co.*, 518.
 19. **STATUTE GIVING CAUSE OF ACTION—EXTRATERRITORIAL EFFECT—PARTIES.**— Where a statute of one state gives a cause of action to the "personal representative" of a person killed by a wrongful act, the widow of one so killed in that state cannot maintain an action in her private capacity under such statute in another state, although under the laws of the latter she could have maintained an action if the accident had happened there, and although no administrator could be appointed in the state where the deceased was killed, because he left no estate there. *Oates v. Union etc. R'y Co.*, 348.
- See BAILMENT, 1; CARRIERS; CONTRACTS, 4, 5; MASTER AND SERVANT; RAILROAD COMPANIES.**

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES; BILLS OF LADING.

NOTICE.

See AGENCY, 2; ATTORNEY AND CLIENT; CHATTEL MORTGAGE, 1; CONTRACTS, 8; CORPORATIONS, 40; CO-TENANCY, 6; LIS PENDENS; VENDOR AND VENDER, 10, 11.

NUISANCES.

PUBLIC NUISANCE.— BEFORE A PRIVATE PERSON CAN SUSTAIN AN ACTION ON ACCOUNT OF A PUBLIC NUISANCE, he must show that the damage suffered by him differs from that suffered by the public, in kind as well as in degree. Therefore he cannot maintain an action for obstructing a public street, when his only special damage is, that in driving to and from his garden he is compelled to take a more inconvenient and circuitous route. *Zettel v. West Bend*, 715.

See INJUNCTIONS, 1.

OBSTRUCTING HIGHWAYS.

See NUISANCES.

OFFICE AND OFFICERS.

1. **OFFICER DE FACTO, WHO IS NOT.** — A mere intruder into an office, acting without color of right, and without recognition by the public, cannot be regarded as an officer *de facto*. Where, therefore, a person elected justice of the peace for a term beginning January 6th, who qualifies and receives from his predecessor the docket on the 1st of January, — both believing the term to begin on that day, — issues a writ of replevin on January 4th, the writ is void, and its issuance is not the act of a *de facto* officer. *Dabney v. Hudson*, 276.
2. **A WOMAN MAY BE APPOINTED DEPUTY COUNTY CLERK.** — When a ministerial officer is authorized to appoint a deputy clerk, he may, unless restricted by statute, appoint whom he pleases, without regard to age, sex, color, or race. *Wilson v. Newton*, 173.

See ACKNOWLEDGMENTS.

OPINION EVIDENCE.

See WITNESSES, 4, 5.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

OUTSTANDING TITLE.

See ADVERSE POSSESSION, 2.

OVER-DRAFTS.

See BANKS AND BANKING, 4, 6.

PARENT AND CHILD.

See RAILROAD COMPANIES, 5-7.

PAROL EVIDENCE.

See CONTRACTS, 2; DEEDS, 2, 8; EVIDENCE, 3-5, 11; USURY, 7.

PARTIES.

1. **STATUTE GIVING CAUSE OF ACTION.** — Where a statute gives a cause of action and designates the persons who may sue, and the time within which their action must be brought, none but the parties so designated can sue, and their action must be brought within the time prescribed by the statute. *Oates v. Union P. R'y Co.*, 348.
 2. **VENDOR AND VENDEE — ACTION AGAINST GRANTOR AND HIS GRANTEE.** — A grantor by warranty deed sued, together with his grantees, to set aside the title assumed to be conveyed may defend in his own name for his grantees, properly served, but not answering, so as to prevent judgment against them by default. *Bausman v. Eads*, 201.
- See CONTRACTS, 4; CORPORATIONS; NEGLIGENCE, 19; PARTITION, 2.

PARTITION.

1. **CO-TENANCY — EQUITY JURISDICTION.** — Jurisdiction to partition lands among co-tenants is an independent head of equity jurisdiction, and

when the statute is merely declaratory of such jurisdiction, it will be exercised by a court of equity on its own established principles, and with the use of its own better and more flexible modes of procedure, unembarrassed by the procrustean rules which cramp the statutory jurisdiction of courts of law. *Donnor v. Quartermas*, 778.

2. **CO-TENANCY — ACCOUNTING — PARTIES.** — When, after the filing of a bill for partition, and for an accounting for rents and profits, between tenants in common, one of them dies, no account can be had against his estate, unless his personal representative is made a party; but the claim for an accounting may be abandoned, and partition had, without making his executor or administrator a party. *Donnor v. Quartermas*, 778.
3. **CO-TENANCY.** — Two tenants in common may unite in a bill for partition against a third co-tenant, and may jointly elect to consider their several moieties as one moiety, and to have it set apart to them as one undivided fractional share of the whole. *Donnor v. Quartermas*, 778.
4. **CO-TENANCY — RIGHT TO PARTITION.** — Every co-tenant is entitled to demand partition, though it may be inconvenient, injurious, or even ruinous to one or more of the parties in interest. *Donnor v. Quartermas*, 778.
5. **CO-TENANCY — IMPROVEMENTS.** — Equity will, if possible, when making partition among co-tenants, give the benefit of any improvements made on the premises to him who has erected or made them, and this is done by assigning to such part owner the portion of the estate on which such improvements are placed. *Donnor v. Quartermas*, 778.

See CO-TENANCY.

PARTNERSHIP.

1. **ASSIGNMENT BY ONE PARTNER OF HIS PROPERTY FOR THE BENEFIT OF CREDITORS DOES NOT CONVEY PROPERTY OF THE PARTNERSHIP, nor any right to the possession thereof.** *Van Kleeck v. Hammell*, 183.
2. **ON THE DEATH OF ONE PARTNER,** title to the partnership assets vests in the survivor, who, in all matters connected with the partnership, becomes the party to sue and to be sued. *Van Kleeck v. Hammell*, 183.
3. **ONE WHO IS A MEMBER OF A PARTNERSHIP, OR WHO HAS PERMITTED HIMSELF TO BE HELD OUT AS SUCH, CANNOT ESCAPE LIABILITY** by showing that he consented that the property of the partnership might be assigned as the individual property of his partner. *Van Kleeck v. Hammell*, 183.
4. **IF PARTIES REPRESENT THEMSELVES AS PARTNERS,** persons who deal with them as such are entitled to have the property used in the business applied to the payment of their debts, in preference to the individual debts of those representing themselves as partners. *Van Kleeck v. Hammell*, 183.
5. **PARTNER CANNOT ESCAPE PARTNERSHIP LIABILITY** by showing that he was induced to enter the partnership by false statements of his copartner. *Van Kleeck v. Hammell*, 183.
6. **REPRESENTATIVES OF A DECEASED PARTNER** have no right to interfere with the partnership property or business, so long as the surviving partner is proceeding in good faith to wind up its affairs. *Van Kleeck v. Hammell*, 183.
7. **ACCOUNTING FOR PARTNERSHIP PROFITS ACQUIRED BY FRAUD.** — A member of a firm established for the conduct of a lawful business is not

entitled to withdraw profits acquired by him in partnership transactions, on the ground that he acquired them by cheating customers of the firm, when the member calling on him for an accounting is innocent of all fraud. *Pennington v. Todd*, 412.

See ABATEMENT, 2; CORPORATIONS, 16; JUDGMENTS, 10.

PATENTS.

See GRANTS; PUBLIC LANDS.

PAYMENT.

FORGED NOTE TAKEN IN EXCHANGE FOR GENUINE ONE NOT PAYMENT. —

The surrender by an indorsee to an indorser of a genuine note in exchange for a note forged by such indorser does not amount to a payment of the genuine note, nor extinguish the indorsee's right to recover against the maker thereof. *West Philadelphia Nat. Bank v. Field*, 562.

See BANKS AND BANKING, 8; BILLS AND NOTES, 26; CORPORATIONS, 10; DURESS, 2; ESTOPPEL, 4.

PERSONAL EXAMINATION.

See TRIAL, 6, 7.

PERSONAL PROPERTY.

See EXECUTORS AND ADMINISTRATORS, 4.

PHOTOGRAPHS.

See EVIDENCE, 1, 2.

PHYSICIANS AND SURGEONS.

EVIDENCE OF PHYSICIAN OF STATEMENTS BY PATIENT. — In an action to recover for personal injury, statements made by plaintiff to his physician, when first seen by him, as to his symptoms, the locality and character of the pain of which he was complaining, as having been produced by an injury, without reference to its cause or manner of occurrence, are admissible. *Birmingham etc. R'y Co. v. Hale*, 742.

PLEADING.

1. **UNDER A PRAYER FOR GENERAL RELIEF**, complainant is entitled to such other and additional relief from that specially prayed for as the allegations of his bill will support, if established by competent evidence. *Lancaster Mills v. Merchants' etc. Co.*, 586.
2. **AMENDMENT OF COMPLAINT.** — A complaint cannot be amended by adding the common counts, when it appears affirmatively that they present a new and separate cause of action from that stated in the original complaint. *Semple v. Glenn*, 894.
3. **DEMURRER TO A PART OF A COUNT** will not be entertained unless the imperfect part is so material as that, being eliminated, it leaves the count without a valid cause of action. *Louisville etc. R. R. Co. v. Hall*, 863.
4. **GENERAL DENIAL IN ANSWER SIMPLY PUTS IN ISSUE ALL MATTERS WHICH PLAINTIFF IS BOUND TO PROVE.** — In an action on a contract, a general denial in the answer puts in issue all matters which the plaintiff is bound to prove to make out his cause of action, and nothing more. If

the defendant seeks to avail himself of facts not appearing upon the face of the contract, in order to establish its invalidity he must plead them. *Milbank v. Jones*, 454.

6. EVIDENCE TO SHOW ILLEGALITY OF CONTRACT SUEB ON INADMISSIBLE UNDER GENERAL DENIAL WHEN. — Where, in an action on a contract, the complaint sets forth and the plaintiff proves a contract valid on its face, the defendant cannot, under an answer which is simply a general denial, give evidence tending to show that the contract was against public policy, and therefore illegal. *Milbank v. Jones*, 454.

6. UNAUTHORIZED PLEADING AS ADMISSION OF FACT. — The contents of an unauthorized pleading filed in a justice's court may be treated on appeal as in the nature of formal admissions made by the party filing it. *Warder etc. Co. v. Willyard*, 250.

See JUDGMENTS, 6; JUSTICES OF THE PEACE, 2.

PLEDGE.

See BILLS AND NOTES, 12, 14.

POLICE POWER.

See MUNICIPAL CORPORATIONS; STATUTES, 4, 5.

POST-NUPTIAL SETTLEMENTS.

See HUSBAND AND WIFE, 2-5.

POWERS.

OBJECTS OF POWER MUST BE SPECIFIED OR ASCERTAINABLE FROM INSTRUMENT ATTEMPTING TO CREATE IT. — To create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be benefited by its execution shall be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created. *Sweeney v. Warren*, 468.

See EXECUTORS AND ADMINISTRATORS, 1, 2; MORTGAGES, 2, 4; TRUSTS, 2.

PRESUMPTIONS.

See BILLS AND NOTES, 24; CORPORATIONS, 10, 17, 19, 32; DEEDS, 7; EXECUTORS AND ADMINISTRATORS, 8; HUSBAND AND WIFE, 11; INFANTS, 2; JUDGMENTS, 3; NEGLIGENCE, 6-9; MARRIAGE AND DIVORCE, 3; RAILROAD COMPANIES, 30; VENDOR AND VENDEE, 10; WILLS, 2.

PRIORITIES.

See ATTACHMENT, 5; CORPORATIONS, 12.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROBATE PRACTICE.

See EXECUTORS AND ADMINISTRATORS.

PROCESS.

1. JURISDICTION. — WHEN SERVICE OF PROCESS IS CONSTRUCTIVE, IT MUST CONFORM, at least substantially, to the requirements of the statute. *Laney v. Garbee*, 391.

2. **AFFIDAVIT FOR ORDER OF PUBLICATION OF SUMMONS MUST SHOW "DUE DILIGENCE."** — The simple averments in an affidavit for an order of publication of summons that the defendant is a non-resident of and cannot be found within the state are not alone sufficient to support an order for the service of a summons by publication, but such affidavit must show that due diligence to find the defendant has been exercised. Due diligence cannot be implied from the statement that the defendant cannot be found within the state. *McCracken v. Flanagan*, 481.
3. **CONSTRUCTIVE SERVICE UPON UNKNOWN CLAIMANTS TO LAND.** — The legislature may, by statute, authorize proceedings by action against unknown claimants, and bind them by constructive or substituted service or notice, in actions to determine adverse claims to real property. Such action is in the nature of a proceeding *in rem*; its object is an adjudication of the state of the title, and the judgment can go no further. *Shepherd v. Ware*, 212.
4. **ADVERSE CLAIMS TO LAND — CONSTRUCTIVE SERVICE.** — The legislature may, by statute, provide for constructive or substituted service of process, in actions to determine adverse claims to land, as against unknown claimants, or in cases of necessity, or where personal service is impracticable, in actions where the controversy relates to property within the jurisdiction of the court, and with a reasonable exercise of legislative discretion in such matters the courts will not interfere. Such statutes must be strictly construed and followed, to preserve the distinction between known and unknown claimants. *Shepherd v. Ware*, 212.
5. **SERVICE OF NEW SUBPOENA NECESSARY UPON FILING SUPPLEMENTAL BILL.** — Where, in a suit for divorce, the plaintiff files a supplemental bill, alleging facts occurring after the filing of her original bill, which, if proved, would entitle her to the relief prayed for in her original bill, it is, under the law and practice of the court of chancery of New Jersey, an indispensable prerequisite to the rendition of a personal judgment against the defendant that a new subpoena be served upon him within the jurisdiction, after the filing of the supplemental bill, or that he appear in the action, notwithstanding he appeared and answered the original bill. *Rigney v. Rigney*, 462.

See **EXECUTIONS; JUDGMENTS; MARRIAGE AND DIVORCE** 3.

PROXIMATE CAUSE

See **RAILROAD COMPANIES**, 2.

PUBLIC LANDS.

1. **A PATENT OF LANDS MUST BE CONSTRUED IN CONNECTION WITH THE MAP WHICH ACCOMPANIED IT, TOGETHER WITH THE SURVEYS AND FIELD-NOTES,** and if the description in the patent is "lot 1, section 6," this will include all of the lot represented on the map and field-notes, though if the lines between sections 6 and 7 were continued, a part of such lot would be in section 7. *Lyon v. Fairbank*, 732.
2. **CONFLICTING PATENTS — POSSESSION SUFFICIENT TO MAINTAIN ACTION.** — Where a government patentee of land on the bank of a river claims an island lying therein as being unpreserved at the time his patent was issued, as against a subsequent patentee of such island, and it appears that the first patentee has four houses upon the disputed land, in one of which he resides, and that such land has been used by his tenants for

various purposes, his possession is sufficient to maintain suit to annul the subsequent patent. *Butler v. Grand Rapids etc. R. R. Co.*, 84.

3. **CONFLICTING PATENTS — ESTOPPEL.** — A government patentee claiming land as against a subsequent patentee who has exercised acts of ownership over it is not estopped by non-claim to assert title as against persons who have never been in possession nor had any title of record. *Butler v. Grand Rapids etc. R. R. Co.*, 84.
4. **PROOF OF LOST PATENT.** — Where an original patent and the record thereof have been destroyed by fire, and the legislature has made an abstract of it a public record of the same effect as the original, the grantee under such patent makes a *prima facie* proof of its contents by the introduction of such record and of a tract-book kept in the office of the register of deeds showing the same description to the same patentee. *Butler v. Grand Rapids etc. R. R. Co.*, 84.
5. **CONFLICTING PATENTS — SUFFICIENCY OF COMPLAINT.** — In an action by a government patentee to cancel a subsequent patent to part of the same land, a complaint which describes this land as a "sand-bar" or "piece of ground," and as a "piece of middle ground," and as "middle ground," is sufficient to include the term "island," when the proofs show that the land in dispute is an island. *Butler v. Grand Rapids etc. R. R. Co.*, 84.
6. **PATENT — EVIDENCE TO IMPEACH.** — In an action by a government patentee to cancel a subsequent government patent to the same land, the complainant may show that the whole title passed to him under his patent, and that the government thereafter had no title to convey. In such cases, courts will protect purchasers from subsequent government surveys. *Butler v. Grand Rapids etc. R. R. Co.*, 84.

See GRANTS.

PUBLIC POLICY.

See ATTACHMENT, 2; INSURANCE, 4.

PUBLICATION.

See PROCESS.

QUARANTINE ORDINANCES.

See MUNICIPAL CORPORATIONS, 2.

QUITCLAIM DEED.

See DEEDS, 2.

RAILROAD COMPANIES.

1. **THE REQUIREMENT THAT AN ENGINEER SHALL BLOW A WHISTLE OR RING A BELL** before reaching a public road or crossing is for the protection of persons who, being at a crossing, are about to pass across the track. Hence a brakeman injured at a crossing cannot recover therefor on the ground that the failure to blow the whistle or ring the bell left him without warning of the approach of the train to the crossing, and thereby caused him to be injured. *Loussville etc. R. R. Co. v. Hall*, 863.
2. **OBJECT OF WARNING AT CROSSINGS.** — The purpose of giving warning before a railroad train or engine comes to a crossing is not only to prevent persons from driving on the track in front of the approaching

train or engine, but also to give notice to travelers upon the highway, so that they may not approach within dangerous proximity to the train. *Quigley v. Delaware etc. Canal Co.*, 504.

3. **NEGLIGENCE — FAILURE TO GIVE WARNING AT CROSSING — PROXIMATE CAUSE.** — When the negligence of a railroad company in failing to give warning of the approach of its engine to a crossing causes the driver of a team on the highway, exercising due care, to go upon the track, where he finds himself in seemingly imminent peril from the approaching engine, and, acting as an ordinarily prudent man would have acted, he is justified in dropping the lines, jumping from the wagon, and abandoning the team; and if it then runs away and is injured, the railroad company is liable in damages for the injury, because its negligent act in failing to give warning is the natural, primary, and proximate cause of the injury. *Quigley v. Delaware etc. Canal Co.*, 504.
4. **LIABILITY FOR NEGLIGENCE OF THIRD PARTY USING ITS CARS.** — A railroad company permitting a third party to use its cars on its spur-track is liable for his negligence in leaving such cars so near the main track as to cause a collision. *Georgia etc. R'y Co. v. Underwood*, 756.
5. **CONTRIBUTORY NEGLIGENCE OF PARENT — INJURY TO CHILD.** — A parent who suffers his child of tender years to wander upon a railroad track, where it is struck and killed by a railroad car, is guilty of contributory negligence, so as to bar a recovery, notwithstanding the negligence of the railroad company. *Westerberg v. Kinzua etc. R. R. Co.*, 510.
6. **MEASURE OF CARE DUE TO CHILDREN NON SUI JURIS.** — A railway company is not required to make its premises a safe playground for young children strictly *non sui juris*, nor is it an insurer of their lives and limbs when playing upon its premises; but when it has placed thereon dangerous machinery, attractive, alluring, and open to such children, it must use ordinary and reasonable care to protect them from the danger to which they are thus exposed. *Haesley v. Winona etc. R. R. Co.*, 220.
7. **MEASURE OF CARE DUE TO CHILDREN NON SUI JURIS ON SIDE-TRACK.** — A railway company exercises ordinary and reasonable care as to trespassing children of tender years, and strictly *non sui juris*, when it leaves its cars, with their brakes firmly set, upon the grade of its gravitated side-track, a few feet distant from a level surface. It is then relieved of liability for an injury to such children caused by the act of a third person in unloosening such brakes. *Haesley v. Winona etc. R. R. Co.*, 220.
8. **NEGLIGENCE, CONTRIBUTORY. — THE ACT OF CLIMBING OVER STATIONARY CARS ON A RAILWAY TRACK,** without looking to see whether they are attached to an engine or not, is such contributory negligence as to preclude any recovery for injuries received while so doing. The fact that the person injured is a police-officer, that his necessity for crossing the track is imperative, and that the cars are obstructing a street in violation of a city ordinance, does not render the rule inapplicable to him. *Corcoran v. St. Louis etc. R'y Co.*, 394.
9. **NEGLIGENCE — DEFECTIVE BRAKE — EVIDENCE.** — In an action to recover for negligence in consequence of a defective brake upon a freight-car, by which a brakeman was injured without his fault, a witness who has examined the broken brake, and has been in the hardware business, is competent to testify that, in his judgment, the "break" was an old fracture. *Moon v. Northern P. R. R. Co.*, 195.

10. **NEGLIGENCE — CAR WITH DEFECTIVE BRAKES** is not an imminently dangerous instrument, so as to render a railway company liable to the servant of another, in the absence of some relation between the servant and the company, arising out of contract or otherwise. *Roddy v. Missouri P. R'y Co.*, 333.
11. **RAILROADS ARE NOT REQUIRED TO ADOPT EVERY APPLIANCE** which even a majority of the well-regulated roads have adopted. Something must be accorded to diversity of judgment; and the failure to adopt a particular appliance cannot be regarded as *per se* recklessness or negligence, though the majority of the other roads have adopted it. *Louisville etc. R. R. Co. v. Hall*, 863.
12. **FAILURE TO PUT UP BULLETIN-BOARDS AND PLACARDS WARNING EMPLOYEES OF DANGER** is immaterial, if they were expressly warned of the same danger by some other means. *Louisville etc. R. R. Co. v. Hall*, 863.
13. **THE FAILURE TO MAINTAIN WHIPPING-STRAPS** to warn brakemen who are on top of the train that it is about to pass under a bridge so low as to imperil their lives is not legal negligence, unless such straps are so manifestly serviceable as to command the consensus of intelligent railroad men, and such men do not honestly differ in judgment as to their utility. *Louisville etc. R. R. Co. v. Hall*, 863.
14. **EVIDENCE OF PRIOR INJURIES SUFFERED BY BRAKEMEN FROM CROSSING UNDER A LOW BRIDGE** is admissible to aid the jury in determining whether the railroad corporation maintaining such bridge had, through its officials, notice of the injuries previously done, and had been guilty of negligence in thereafter maintaining the bridge at the same elevation. *Louisville etc. R. R. Co. v. Hall*, 863.
15. **RAILWAY CORPORATION MAY BE EXCUSED FOR MAINTAINING A BRIDGE SO LOW AS TO ENDANGER ITS EMPLOYEES**, if the irregularity of the ground's surface and the state of the neighboring improvements were such that the bridge could not be raised without too great inconvenience to vehicles crossing it, without great and serious injury to neighboring land proprietors, or without too great an expense to the corporation. Therefore a jury should consider all these matters in determining whether or not the corporation was negligent in maintaining the bridge so low as it did. *Louisville etc. R. R. Co. v. Hall*, 863.
16. **RAILROAD IS GUILTY OF NEGLIGENCE IN MAINTAINING A BRIDGE SO LOW AS TO IMPERIL THE LIVES OF ITS EMPLOYEES**, if it might have been raised above the danger line without great expense, and without too great inconvenience and injury to the public or to adjacent property-holders affected thereby. *Louisville etc. R. R. Co. v. Hall*, 863.
17. **LOW BRIDGE — CONTRIBUTORY NEGLIGENCE.** — If a brakeman is reasonably notified of a low bridge, this puts him on the lookout and on inquiry and observation, and if he fails in this duty, when such observation would have enabled him to know where the bridge was located, he is guilty of contributory negligence, and cannot recover if injured on account thereof. *Louisville etc. R. R. Co. v. Hall*, 863.
18. **CROSS-EXAMINATION OF A WITNESS SHOULD NOT BE PERMITTED WHEN IT TENDS TO MULTIPLY THE ISSUES** so as to embarrass, if not to mislead, the jury. Hence when a witness has testified to the use and usefulness of whipping-straps as cautionary signals, a cross-examination is not proper which requires the witness to testify to the rule and habit of railroads in many states, to injuries inflicted by overhead, low bridges, to roads being mulcted in damages in consequence of such injuries, and

- their subsequently adopting whipping-straps. *Louisville etc. R. R. Co. v. Hall*, 863.
19. **CONNECTING LINES—LIABILITY FOR DELIVERY OF UNSAFE CAR.**—Where connecting railroads mutually agree to transport the loaded freight-cars of each over their respective lines, each is under obligation to exercise due diligence in providing reasonably safe cars for the service contemplated. Such duty is not limited to the corporations as such, but extends to and is owed to their servants who must necessarily handle the cars, and who may be exposed to danger arising from their unsafe or defective condition. The carrier neglecting this duty is liable in damages for its negligence. *Moon v. Northern Pac. R. R. Co.*, 195.
20. **CONNECTING LINES—LIABILITY FOR DELIVERY OF UNSAFE CAR.**—Under a mutual agreement between connecting railroads to transport the loaded freight-cars of each over their respective lines, the delivery of its car by one to the servants of the other line is an affirmation that the car is fit for use, and the latter are entitled to repose confidence in the implied assurance that such is the fact. *Moon v. Northern Pac. R. R. Co.*, 195.
21. **CONNECTING LINES—LIABILITY FOR DELIVERY OF UNSAFE CAR.**—Under a mutual agreement between connecting carriers to transport the loaded freight-cars of each over their respective lines, the receiving company is liable to its employees, if it undertakes to use the cars of the other company without due inspection, and they turn out to be defective and unsafe by reason of defects ascertainable by reasonably careful inspection; but the neglect of the receiving company to perform this duty will not excuse or relieve the delivering company from liability for injuries resulting from its negligence in delivering unsafe and defective cars. Its negligence is the proximate cause of the injury. *Moon v. Northern Pac. R. R. Co.*, 195.
22. **CONNECTING LINES—LIABILITY FOR DELIVERY OF UNSAFE CAR.**—Under a mutual agreement between connecting railroads to carry the loaded freight-cars of each over their respective lines, it is the duty of the delivering carrier to use reasonable diligence in the examination and supervision of appliances on its cars, which, being in constant use, are liable to get out of repair. The measure of care and diligence required must be proportioned to the risk and danger to be apprehended. If the safety of an employee of the receiving carrier depends upon the strength and soundness of such appliances, the failure of the delivering carrier to use reasonable diligence to make and keep them safe, and to make seasonable and adequate inspection before delivery of the cars, is negligence for which it is liable. *Moon v. Northern Pac. R. R. Co.*, 195.
23. **CARRIERS OF PASSENGERS—EXPULSION OF PASSENGER—NON-PAYMENT OF FARE.**—Where a passenger without a ticket, after opportunity to procure one, boards a passenger train to ride from one station to another, upon being informed of the train fare pays it to the conductor, who, before the train arrives at the first station from the starting-point, informs the passenger that he has made an error in the amount of fare, requesting enough additional to make the full fare, which the passenger refuses to pay, he may be expelled from the train at the first station from the starting-point, after a return of the money paid by him, less the fare between the stations; but the return of the money is a condition precedent to the right of expulsion; and if the passenger is expelled before it is

returned, his cause of action is complete, and cannot be impaired by the subsequent, though immediate, tender of the amount remaining due to him. *Wardwell v. Chicago etc. R'y Co.*, 246.

24. **CARRIERS OF PASSENGERS — NON-WAIVER OF TRAIN FARE.** — Although a train conductor may have authority to accept for the fare of a passenger without a ticket less than full fare, and thereby waive the company's right to full train fare, the receipt by the conductor, through mistake, for the full fare, of less than that fare will not constitute a waiver. He has a right, upon discovering the mistake, to require the passenger, within a reasonable time, on informing him of the error, to pay the full train fare; and upon his refusal, may retain the money paid until the next station is reached, where he may eject the passenger, after returning the money paid, less the fare between the starting-point and the point of expulsion. *Wardwell v. Chicago etc. R'y Co.*, 246.
25. **CARRIERS OF PASSENGERS — EXPULSION OF PASSENGER FOR NON-PAYMENT OF FARE.** — Where one without a ticket voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has the right to expel him before reaching his destination, a request must be implied to be carried to the place where the company may rightfully expel him, which is the next regular station, and there he may be put off the train. *Wardwell v. Chicago etc. R'y Co.*, 246.
26. **LIABILITY OF RAILROAD COMPANY FOR EJECTING PASSENGER FROM WHOM CONDUCTOR HAS TAKEN WRONG END OF TICKET.** — Where a passenger purchases a round-trip railway ticket, and the first conductor to whom it is handed, by mistake, returns to the passenger the wrong end of the ticket, and the conductor on the return trip, ignoring the passenger's explanation, refuses to accept his ticket, and ejects him for want of a proper ticket, the railway company will be liable in damages for so ejecting him. *Kansas City etc. R. R. Co. v. Riley*, 309.
27. **REGULATION OF RAILWAY COMPANY MAKING TICKET ONLY EVIDENCE OF PASSENGER'S RIGHT TO TRAVEL ON TRAIN UNREASONABLE.** — A passenger on a railway train holding the wrong end of a round-trip ticket, returned to him by the mistake of the company's conductor, and giving a reasonable explanation of the mistake to the conductor to whom he offers it, is entitled to be carried according to the real contract; and any regulation of the company making the ticket the only evidence of the passenger's right to travel on the train, and authorizing the conductor to disregard the passenger's explanation, is unreasonable, and cannot justify his expulsion. *Kansas City etc. R. R. Co. v. Riley*, 309.
28. **CONTRIBUTORY NEGLIGENCE — PROTRUDING ARM FROM WINDOW OF CAR.** — It is negligence *per se*, to be declared by the court as matter of law, for a passenger on a steam-railway to protrude his arm, hand, or elbow through or beyond the outer edge of the window or surface of the car while the latter is in motion, and no recovery can be had for an injury which is proximately caused by such negligence. *Georgia etc. R'y Co. v. Underwood*, 756.
29. **NEGLIGENCE IN STARTING STEAM-CARS.** — Steam-cars stopping at regular stations are only required to halt a sufficient time to allow passengers to alight by the exercise of ordinary diligence on their part; and the conductor in charge, having waited a reasonable time, is not negligent in starting the train while a passenger is in the act of alighting, or is in a dangerous position, unless, in the exercise of reasonable

care, he knows, or ought to know, of such danger to the passenger. *Birmingham etc. R'y Co. v. Smith*, 761.

30. **NEGLIGENCE — UNSAFE CONDITION OF TRACK. — EXEMPLARY DAMAGES** are authorized from an injury to a passenger arising from an accident caused by a broken rail, when the evidence shows an unsafe condition of the track at that place, so long continued as to make the failure to discover and remedy it gross negligence, or equivalent to recklessness, wantonness, or intentional wrong towards the passenger on the part of the railroad company. *Alabama etc. R. R. Co. v. Hill*, 764.
31. **PRESUMPTION OF NEGLIGENCE FROM ACCIDENT — BURDEN OF PROOF.** — An injury to a passenger by a collision on a railroad train, while he is exercising that degree of care which may be reasonably expected of a person in his situation, raises a presumption of negligence against the railroad company, and casts upon it the burden of rebutting the presumption of showing that diligence and a careful observance of duty on its part could not have prevented the injury. *Georgia etc. R'y Co. v. Love*, 927.
32. **NEGLIGENCE — STREET-CAR PASSENGER.** — A passenger who voluntarily jumps on or off a street-car while it is in motion does so at his own peril, and that construction of the car is not defective which is only unsafe in view of such conduct. *Werbowsky v. Fort Wayne etc. R'y Co.*, 120.
33. **NEGLIGENCE IN STARTING HORSE-CAR.** — The driver of a horse-car, when signaled to stop, must ascertain who and how many of his passengers intend to alight at that place, and must wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and must, in any event, see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts it in motion. If he fails in any of these respects, and injury results therefrom, his employer is liable. *Birmingham etc. R'y Co. v. Smith*, 761.
34. **NEGLIGENCE — DUTY OF STREET-CAR COMPANY.** — Street-car companies must allow their patrons an opportunity to get on and off the cars, and the starting of a car while either is being done is negligence, no matter what the construction of the car; but such act does not make that defective which under other circumstances is reasonably safe. *Werbowsky v. Fort Wayne etc. R'y Co.*, 120.
35. **NEGLIGENCE. — USE OF APPLIANCES** in universal and common use for the same purpose is not negligence. Nor can it be said that the mode of construction of a street-car is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of the passenger or the company. *Werbowsky v. Fort Wayne etc. R'y Co.*, 120.

See CARRIERS; NEGLIGENCE, 2.

RAPE

See ASSAULT.

REAL PROPERTY.

- LAND-OWNER'S RIGHT TO REMOVE INTRUDERS.** — Owners of land on which a trespasser has entered and placed buildings and other structures have the right to remove him and the structures by force, if they can do so without a breach of the peace; and even though they use so much force

and violence as to subject them to indictment at common law for a breach of the peace, or, under the statute, for making a forcible entry, they are not liable to an action of trespass, nor for assault and battery, nor for injury to the trespasser's structures so removed, unless they used more force than was reasonably necessary to accomplish his removal and that of his structures and goods. *Lyon v. Fairbank*, 732.

See ABSTRACTS OF TITLE; ADVERSE POSSESSION.

RECORDS.

1. **MANDAMUS—INSPECTION OF COURT RECORDS.** — *Mandamus* will not lie in favor of a person not a party to an action, to compel the submission for examination of the records and papers in a case, for the purpose of publishing statements in regard thereto in a newspaper before trial or hearing, or before they become public by proceedings in open court. *Schmedding v. May*, 74.
2. **COURT RECORDS—RIGHT TO WITHHOLD FROM PUBLIC.** — The parties to a suit may, under direction of the court, lawfully withhold the records and papers in the case, and prevent any statement in regard thereto being made public until they are made public by the consent of the parties, or by proceedings in open court. *Schmedding v. May*, 74.

REDEMPTION.

See EXECUTIONS, 6; MORTGAGES, 6.

REGISTRATION.

See CHATTEL MORTGAGE, 1.

REPLEVIN.

See ATTACHMENT, 4; OFFICE AND OFFICER, 1.

RES GESTÆ

See EVIDENCE, 7; HOMICIDE, 2.

RES JUDICATA.

See JUDGMENTS.

RESTRAINT OF TRADE.

See CONTRACTS, 3; MUNICIPAL CORPORATIONS, 2, 3, 5.

RESCISSION.

See SALES, 1.

RIPARIAN RIGHTS.

1. **WATERS—RIGHT OF NAVIGATION AND RIPARIAN RIGHTS.** — A navigable river is public, but its banks are private property, and the right to use the stream as a highway, and the right to land for the purpose of receiving and discharging freight and passengers, are distinct, so that those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank at other places than a public landing, for the purpose of loading or unloading vessels, without the consent of the owner, except in cases of peril or necessity. *Compton v. Hankins*, 823.

2. **TO DETERMINE THE RIGHTS OF OWNERS OF LANDS ADJACENT TO A BAY OR OTHER NAVIGABLE WATER** in the lands and waters lying between their line and the line of navigable waters, or any new line in the bay in front of the lands of such owners, the following general rules are adopted: 1. To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has; 2. To divide the newly formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly formed line. *Blodgett etc. L. Co. v. Peters*, 175.
3. **IN DETERMINING THE RIGHTS OF OWNERS OF LANDS FRONTING ON WATERS IN THE WATERS ADJACENT TO THEIR LANDS**, the actual shore line should not be taken as a basis for computation, if it happens to be elongated by deep indentations or sharp projections, but the general line ought to be taken in the same mode that the meanders are run by the United States government. *Blodgett etc. L. Co. v. Peters*, 175.
4. **WATERS — RIGHT TO DRAIN SURFACE WATER.** — A land-owner has no right, under any circumstances, to reclaim his land by digging an artificial ditch and carrying the surface water thereon at once upon the land of an adjoining owner, rendering it wet and untillable, nor can such right be upheld on the ground that its exercise is an act of good husbandry. *Yerex v. Hineder*, 113.

See GRANTS; WHARVES.

SALES.

1. **CONDITIONAL SALE — PAYMENT AND RESCISSION THEREOF.** — Where a note is given in payment for a sewing-machine, the title to which is to be held by the seller until the payment of the note, which is left with a third party authorized to receive cattle in payment and to surrender the note, and after such surrender the cattle are claimed by the execution creditors of the maker of the note, who thereupon redelivers the note to the third person, under agreement that it shall be considered that no payment has been made, the title to the machine is thereby reinvested in the seller upon his ratification of the transaction, although the third party had no authority except to receive payment of the note and to surrender it. *Bolling v. Kirby*, 789.
2. **CONDITIONAL SALES — BREACH OF CONDITION — RIGHTS OF PARTIES.** — Under a conditional sale providing that the title should remain in the seller until the purchase-notes were paid, and that on non-payment of any of them at maturity the seller should have the right to take possession of the property, but not providing that this should operate as a rescission or as a forfeiture of the payments made, the taking possession by the seller upon default in payments by the buyer will not entitle the latter to rescind, or to recover the amount paid, or to a delivery of the unpaid notes, or to any lien upon the property for the amount paid by him; but upon the payment of the amount remaining due, he is entitled to a return of the property. *Tufts v. D'Arcambal*, 79.
3. **CONDITIONAL SALE.** — A contract termed a "lease," by which the owner of chattels agrees to deliver them to one who agrees to pay a gross sum as "hire," the title to remain in the "lessor" until the entire "hire" is paid, but which contains no express stipulation for the return of the

property at the end of the term, is a conditional sale, and not a bailment, and renders the property subject to an execution in favor of the lessee's creditors. *Farquhar v. McAlevy*, 497.

4. **SALE OF PROPERTY, TITLE TO WHICH IS RETAINED AS SECURITY, DOES NOT PRECLUDE RECOVERY OF BALANCE OF PRICE WHEN.** — Where property is sold, the seller taking notes for the price, in each of which it is stipulated that the title to the property should remain in him until full payment of the notes, and that in case of default the payments previously made should be considered as payments for the use of the property, and after default in payment of the last note, the seller retakes the property and sells it, after notice to the buyer, for a sum less than the amount due him on the last note, such sale will not preclude him from recovering the balance due to him on said note, such note stipulating that it was to be paid absolutely and at all events, and without defense. *Dederick v. Wolfe*, 283.

See USURY, 3.

SELF-DEFENSE.

See HOMICIDE, 3, 4.

SET-OFF.

- JUDGMENTS — CONCLUSIVENESS OF, AS AGAINST SET-OFF.** — A set-off may or may not be pleaded, at the election of the defendant; and if not pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense to another action by the same plaintiff, is not affected or impaired by a judgment against the defendant. This rule applies to a suit on a judgment rendered in another state, in the absence of proof that a different rule prevails there. *Boach v. Priest*, 819.

SHERIFF.

See EXECUTIONS, 1, 2.

SOCIAL CLUBS.

See INTOXICATING LIQUORS.

SPECIFIC PERFORMANCE.

1. **VENDOR AND VENUEE — VOID OPTION AS CONTINUING OFFER TO SELL.** — An option for the purchase of land, though void as an option because of an extension of time without new consideration, is still valid as a continuing offer to sell, and if accepted before retraction, together with a tender of the purchase price, it constitutes a contract upon which specific performance may be had. *Idc v. Leiser*, 17.
2. **VENDOR AND VENDEE — CONTRACT OF SALE.** — A complaint in an action for the specific performance of a contract for the sale of land need not allege the non-existence of a complete or adequate remedy at law in damages. *Idc v. Leiser*, 17.
3. **VENDOR AND VENDEE — CONTRACT OF SALE.** — A complaint in an action for the specific performance of a contract for the sale of land, alleging that the vendor was the owner thereof at the time of the execution of the contract, need not allege that he was the owner at the time that such complaint was filed. *Idc v. Leiser*, 17.

SPENDTHRIFT TRUSTS.

See DEVISES, 4.

STATES.

See CORPORATIONS, 2.

STATUTE OF FRAUDS.

See CONTRACTS, 7; LEASE, 5; VENDOR AND VENDEE, 5.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **TITLE TO STATUTE** need not be a complete index to its provisions, but the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to the members of the legislature and to others specially interested. *Philadelphia v. Ridge etc. R'y Co.*, 512.
2. **TITLE TO STATUTE** must clearly express the subject or subjects contained therein, otherwise the statute is unconstitutional and void. *Philadelphia v. Ridge etc. R'y Co.*, 512.
3. **TITLE OF SUPPLEMENTAL ACT.** — When a statute is a supplement to a former statute, the subject of which is sufficiently expressed in its title, while the provisions of the supplement are germane to the subject of the original, the general rule is, that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto. *Philadelphia v. Ridge etc. R'y Co.*, 512.
4. **POLICE POWER — PREVENTION OF FRAUD.** — The state may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious. *People v. Wagner*, 141.
5. **POLICE POWER — EXTENT OF.** — The police power of the state is not confined to regulations looking to the preservation of life, health, good order, and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection. *People v. Wagner*, 141.
6. **CONSTITUTIONAL LAW — STATUTE LEGALIZING DEEDS OF DIVORCED MARRIED WOMEN.** — A statute, retrospective as well as prospective in its operation, legalizing the sole deeds of married women, executed in good faith after judgment of divorce in certain cases, although defective service of process may have rendered the judgment invalid in fact for want of jurisdiction, is valid and constitutional, and such deed, executed in a case provided for by the statute, conveys a good title. *Wistar v. Foster*, 241.

See ESTOPPEL, 3; NEGLIGENCE, 19.

STOCK AND STOCKHOLDERS.

See CORPORATIONS.

STREET-CAR COMPANIES.

See RAILROAD COMPANIES, 32-35.

STREETS.

See INJUNCTIONS, 1.

SUBPOENA.

See PROCESS, 5.

SUBROGATION.

See DEBTOR AND CREDITOR; INSURANCE, 10.

SUBSCRIPTIONS.

See CORPORATIONS.

SUNDAY.

See ANIMALS.

SURVEYS.

GOVERNMENT SURVEYS, SHORTAGE IN, HOW APPORTIONED. — Where the government map and the original field-notes show a township and each of its sections to be full, but all the monuments between the two northern tiers of sections are lost, and the evidence shows that there is a shortage in the measurement of those two tiers, such shortage should not fall wholly on the northern tier, but should be apportioned equally between the two tiers, although the original survey must have been made by beginning in the southeast corner of the township, and working northward. *James v. Drew*, 287.

See GRANTS.

SURVIVAL OF ACTIONS.

See ABATEMENT.

TAX SALES.

See CO-TENANCY, 2-6.

TAXATION.

See ESTOPPEL, 4; MORTGAGES, 1.

TELEGRAPH COMPANIES.

1. **TELEGRAPH LINE IN STREET IS ADDITIONAL SERVITUDE FOR WHICH ABUTTING OWNER MUST BE COMPENSATED.** — A telegraph line along a public street is no part of the equipment of the street, but is foreign to its use, and an additional servitude. A municipal corporation cannot therefore authorize a telegraph company to construct its line along a public street, without first making compensation to an abutting owner, whether the fee in the street is in him or in the public. *Stowers v. Postal Tel. Co.*, 290.
2. **DAMAGES FOR MENTAL SUFFERING DISCONNECTED FROM PHYSICAL INJURY NOT RECOVERABLE IN ACTION FOR NEGLIGENCE.** — In an action against a telegraph company for negligent delay in delivering a message, damages cannot be recovered for mere mental suffering disconnected from physical injury, and not the result of the willful wrong of the defendant. *Western U. Tel. Co. v. Rogers*, 300.

TELEPHONE COMPANIES.

See NEGLIGENCE, 2.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See MORTGAGES, 2.

THREATS.

See DURESS, 1; HOMICIDE, 6.

TORTS.

See ABATEMENT, 1; TRESPASS.

TRADE-MARKS.

1. **TRADE-MARK, WHAT IS AND WHAT IS NOT.** — A trade-mark is a distinctive sign or mark by which the manufactured articles produced by one person, or firm, or maker are distinguishable from those produced by rival manufacturers. It is not an invention, nor does it relate to or affect processes of manufacture or mechanical combinations. *Hoyt v. Hoyt*, 575.
2. **SIZE, SHAPE, OR MODE OF CONSTRUCTION OF THING IN WHICH GOODS ARE PUT NOT TRADE-MARK.** — The size, shape, or mode of construction of a box, barrel, bottle, or package in which goods may be put is not a trade-mark. *Hoyt v. Hoyt*, 575.
3. **MANUFACTURER NOT ENJOINED FROM USING LABEL, BOTTLE, OR MODE OF PACKING WHEN.** — A manufacturer will not be enjoined from using a label resembling one used, but not originated, by the plaintiff; nor from using stock bottles to which neither party has an exclusive right; nor from using a method of packing bottles which any one is at liberty to employ. *Hoyt v. Hoyt*, 575.
4. **SIGN, DEVICE, OR MARK ORIGINATED BY ONE MANUFACTURER CANNOT BE ADOPTED BY ANOTHER AS HIS TRADE-MARK.** — A sign, device, or mark originated and in actual use by one manufacturer cannot be adopted and registered by another, who takes a fancy to it, as his trade-mark, and such adoption and registration will not confer a title on him who makes it, because it would be an infringement upon the original owner. *Hoyt v. Hoyt*, 575.
5. **A PERSON HAS A RIGHT TO THE EXCLUSIVE USE OF MARKS, FORMS, OR SYMBOLS** appropriated by him for the purpose of pointing out the true origin or ownership of an article manufactured by him; but such designs cannot be used for the simple purpose of naming or describing the quality of the goods. *Liggett etc. T. Co. v. Reid T. Co.*, 313.
6. **INFRINGEMENT — INJUNCTION — EVIDENCE.** — To constitute an infringement of a trade-mark, so as to entitle the owner thereof to an injunction against the infringing party, it is sufficient that the imitation is such as would be likely to mislead one in the ordinary course of purchasing the goods, and lead him to suppose or believe that he was purchasing the genuine article. It is not necessary to show that any one has been in fact deceived, nor to establish intentional fraud. *Liggett etc. T. Co. v. Reid T. Co.*, 313.

- 7. INFRINGEMENT — INJUNCTION.** — One who has appropriated a trade-mark to distinguish his goods from other similar goods has a property right in it which will be protected by injunction against the infringing party. To entitle him to a perpetual injunction, the imitation need not be exact or perfect. *Liggett etc. T. Co. v. Reid T. Co.*, 313.

TRESPASS.

- 1. THE QUESTION OF TITLE TO REAL ESTATE MAY BE RAISED IN AN ACTION OF TRESPASS,** where the defendants insist that they had a right to do what they did, because they were the owners and entitled to the possession of the property, and the plaintiffs were trespassers thereon. *Lyon v. Fairbank*, 732.
- 2. TORT — JOINT DEFENDANTS — RECOVERY AGAINST ONE.** — In an action of tort against joint defendants, recovery may be had against the defendant alone who committed the wrong. *Costello v. Ten Eyck*, 128.
- See ABATEMENT, 3; LEASE, 4; REAL PROPERTY.

TRIAL.

- 1. DISCONTINUANCE OF ACTION.** — The discontinuance of action provided by section 3396, Virginia Code, applies only to such defendants as are not served with process, and is inapplicable when all the defendants have been served. *Corbin v. Planters Nat. Bank*, 673.
- 2. RIGHT TO REOPEN CASE.** — The right of defendant in a criminal trial to reopen the case for the purpose of introducing additional proof of his reputation for truth and morality is entirely within the discretion of the court. Its refusal to so reopen the case is not a ground for reversal, unless such discretion has been abused or unfairly exercised. *State v. Skroyer*, 344.
- 3. GENERAL OBJECTION TO EVIDENCE,** part of which is admissible, is properly overruled. *Still v. State*, 853.
- 4. ESTOPPEL TO OBJECT TO THE ADMISSION OF EVIDENCE.** — Though the loss of an original deed is not so proved as to warrant the admission of evidence of a copy, yet if the party assigning as error the reception of such copy in evidence himself claims a right of possession necessarily based on the original deed, this is a sufficient acceptance of the ruling of the court to estop him from denying that it was properly in evidence before the court. *Hope v. Blair*, 366.
- 5. VERDICT — SUFFICIENCY OF EVIDENCE.** — When the evidence is in equipoise, the verdict must be against the party on whom the burden of proof primarily rested; but in a civil case the verdict may be based on a preponderance of the evidence, if sufficient to satisfy the minds of the jury. Clearly convincing proof is not required. *Birmingham etc. Ry Co. v. Hale*, 748.
- 6. PERSONAL EXAMINATION OF INJURED PERSON.** — It is within the sound discretion of the trial court to order the surgical examination by experts of the person of a plaintiff seeking to recover for personal injury, although the defendant has no absolute right to have such order made and executed. The exercise of such discretion will be reviewed on appeal, and corrected if abused, but the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that justice requires the disclosure or more certain ascertainment of facts which can only be produced or fully elucidated by such examina-

tion, and that it may be made without danger to life or health, or the infliction of serious pain; and the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule stated, is such an abuse of discretion as will operate to reverse a judgment in favor of plaintiff. *Alabama etc. R. R. Co. v. Hill*, 764.

7. **PERSONAL EXAMINATION OF PARTY INJURED.** — In an action to recover for personal injury, where it appears that plaintiff, a young unmarried woman, has submitted to several personal examinations by her physician, who states the nature, extent, and probable effects of her injuries, but whose statement is questioned by other physicians, the defendant is entitled to an order that plaintiff submit to a personal examination by a disinterested surgeon, and the refusal to grant such order is reversible error, when the examination will not endanger life or health. *Alabama etc. R. R. Co. v. Hill*, 764.
8. **A PARTY IS NOT ENTITLED TO HAVE ANSWERS SUPPRESSED**, if they are in response to interrogatories to which he interposed no objection, and to which he propounded cross-interrogatories. *Louisville etc. R. R. Co. v. Hall*, 863.
9. **INSTRUCTIONS.** — **CLERICAL ERRORS** in instructions, readily discovered upon reading them, are not grounds for reversal. *Shortel v. St. Joseph*, 317.
10. **ARGUMENTATIVE CHARGES**, based on specific parts of the evidence, are properly refused. *Birmingham etc. R'y Co. v. Hale*, 748.
11. **INSTRUCTION INAPPLICABLE TO CASE SHOULD NOT BE GIVEN.** — An instruction which has no application to the case as made by the evidence should not be given to the jury. *Maury v. State*, 291.
12. **TIME FOR DELIBERATION OF JURY INSUFFICIENT WHEN.** — Where a jury in a murder case retire for deliberation at 10:35, P. M., on Saturday night, and at 11:30, P. M., ask the court how long they have to deliberate, and are informed that the court will adjourn at 12 o'clock, whereupon they immediately return a verdict of guilty, the time given for deliberation is insufficient. *Maury v. State*, 291.

See APPEAL.

TROVER.

1. **CONVERSION — WHAT CONSTITUTES.** — An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion. It is not essential to conversion sufficient to support the action of trover that the defendant should have the complete manucaption of the property. *Bolling v. Kirby*, 789.
2. **CONVERSION — WHAT CONSTITUTES.** — Where, under a conditional sale of a sewing-machine, the seller, upon default in payment, demands the machine from the purchaser's wife, the purchaser himself having left the state, and her father unconditionally refuses to allow the seller to take possession of the machine, this will amount to a conversion; but if such refusal is based on a disputed question of payment, and upon an agreement that the father is to have time to ascertain if payment has been made, and if it has not, to surrender the machine, then he is not guilty of conversion, although in the mean time the original purchaser returns and removes the machine without his knowledge or consent. *Bolling v. Kirby*, 789.

3. **CONVERSION, TO SUSTAIN TROVER**, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right, or a withholding of possession under a claim of title inconsistent with the title of the owner. *Bolling v. Kirby*, 789.
4. **CONVERSION UPON WHICH TROVER MAY BE BASED** must be a positive tortious act. Non-feasance or neglect of legal duty, or mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action. *Bolling v. Kirby*, 789.
5. **CONVERSION CANNOT BE BASED ON POSSESSION RETAINED BY AGREEMENT** until demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed. *Bolling v. Kirby*, 789.
6. **CONVERSION. — BARE POSSESSION OF PROPERTY**, without some wrongful act in the acquisition of possession, or in its detention, and without any illegal assumption of ownership, or illegal user or misuser, is not a conversion for which trover will lie. *Bolling v. Kirby*, 789.
7. **CONVERSION. — BAILEE UNDERTAKING TO CARRY PROPERTY TO THE OWNER**, but failing to do so, whereby it is subsequently lost while in his possession, through no positive misconduct of his, is not liable for conversion. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him. *Bolling v. Kirby*, 789.
8. **CONVERSION. — ONE HAVING NOTICE** of the claim of the true owner, and who delivers the property to another person, or permits him to take it out of his possession, whereby it is lost to the owner, is liable for its value in trover. *Bolling v. Kirby*, 789.

TRUSTS.

1. **TRUST FUND — INSOLVENT ESTATE — SETTLEMENT OF ACCOUNT. —** Where a railroad company indorses a note, guaranteeing its payment at maturity, on condition that it owes the maker the amount named therein at that time, but prior thereto settles with him, and retains sufficient money to pay the note, charging it to him on its books, and crediting it to the payee, to whom it fails to pay the money as agreed, and mingles it with its own effects, after which a receiver for the railroad is appointed and its effects pass to him, the money so received by the company is not a debt in the hands of the receiver, but is a trust fund, which he is bound to pay over to the payee in the note. *Curley v. Graves*, 99.
2. **EQUITY HAS NO JURISDICTION OF A TRUST** where the trust is created, and both the trustee and trust estate are in another state. *Lines v. Lines*, 487.
3. **TRUST WITH RESERVE POWER OF REVOCATION. —** A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the grantor, and according to the terms in which it is reserved, the validity of the trust remains as though there had never been a reserved right of revocation. *Lines v. Lines*, 487.
4. **IF THE TITLE OF A CESTUI QUE TRUST IS DIVESTED, AND INVESTED IN HIS TRUSTEE**, and this fact appears on the face of the instruments, there is no presumption of honesty in the transaction, and one who subse-

tion, and that it may be made without danger to life or health, or the infliction of serious pain; and the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule stated, is such an abuse of discretion as will operate to reverse a judgment in favor of plaintiff. *Alabama etc. R. R. Co. v. Hill*, 764.

7. **PERSONAL EXAMINATION OF PARTY INJURED.** — In an action to recover for personal injury, where it appears that plaintiff, a young unmarried woman, has submitted to several personal examinations by her physician, who states the nature, extent, and probable effects of her injuries, but whose statement is questioned by other physicians, the defendant is entitled to an order that plaintiff submit to a personal examination by a disinterested surgeon, and the refusal to grant such order is reversible error, when the examination will not endanger life or health. *Alabama etc. R. R. Co. v. Hill*, 764.
8. **A PARTY IS NOT ENTITLED TO HAVE ANSWERS SUPPRESSED**, if they are in response to interrogatories to which he interposed no objection, and to which he propounded cross-interrogatories. *Louisville etc. R. R. Co. v. Hall*, 863.
9. **INSTRUCTIONS.** — **CLERICAL ERRORS** in instructions, readily discovered upon reading them, are not grounds for reversal. *Shortel v. St. Joseph*, 317.
10. **ARGUMENTATIVE CHARGES**, based on specific parts of the evidence, are properly refused. *Birmingham etc. R'y Co. v. Hale*, 748.
11. **INSTRUCTION INAPPLICABLE TO CASE SHOULD NOT BE GIVEN.** — An instruction which has no application to the case as made by the evidence should not be given to the jury. *Maury v. State*, 291.
12. **TIME FOR DELIBERATION OF JURY INSUFFICIENT WHEN.** — Where a jury in a murder case retire for deliberation at 10:35, P. M., on Saturday night, and at 11:30, P. M., ask the court how long they have to deliberate, and are informed that the court will adjourn at 12 o'clock, whereupon they immediately return a verdict of guilty, the time given for deliberation is insufficient. *Maury v. State*, 291.

See APPEAL.

TROVER.

1. **CONVERSION — WHAT CONSTITUTES.** — An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion. It is not essential to conversion sufficient to support the action of trover that the defendant should have the complete manucaption of the property. *Bolling v. Kirby*, 789.
2. **CONVERSION — WHAT CONSTITUTES.** — Where, under a conditional sale of a sewing-machine, the seller, upon default in payment, demands the machine from the purchaser's wife, the purchaser himself having left the state, and her father unconditionally refuses to allow the seller to take possession of the machine, this will amount to a conversion; but if such refusal is based on a disputed question of payment, and upon an agreement that the father is to have time to ascertain if payment has been made, and if it has not, to surrender the machine, then he is not guilty of conversion, although in the mean time the original purchaser returns and removes the machine without his knowledge or consent. *Bolling v. Kirby*, 789.

3. **CONVERSION, TO SUSTAIN TROVER**, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it; an appropriation of it by defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right, or a withholding of possession under a claim of title inconsistent with the title of the owner. *Bolling v. Kirby*, 789.
4. **CONVERSION UPON WHICH TROVER MAY BE BASED** must be a positive tortious act. Non-feasance or neglect of legal duty, or mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action. *Bolling v. Kirby*, 789.
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quently acquires title from the trustee is not entitled to protection as an innocent purchaser. *Winter v. Truax*, 160.

5. **INTERCEPTION BY DEVISEE OF BOUNTY INTENDED FOR ANOTHER IS FRAUD FROM WHICH TRUST ARISES WHEN.** — Where a devisee in a will is active in preventing the testator from making an intended provision therein for another, for whom provision would have been made but for his intervention, such devisee will be held to be a trustee of any devise to himself to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Such interception and diversion of the testator's bounty amount to fraud, from which a trust arises by operation of law. *Ragdale v. Ragdale*, 256.
6. **TRUST DEED, WHEN NOT TESTAMENTARY.** — A voluntary deed, by which personal property is conveyed to a trustee, to be divided among certain beneficiaries at a time to be selected by him, containing a power of revocation, and providing that before distribution the income shall be paid to the grantor during his life, creates a valid trust, and is not testamentary in character. *Lines v. Lines*, 487.

See DEVISEE, 4; LIMITATIONS OF ACTIONS; POWERS.

ULTRA VIRES.

See CORPORATIONS.

UNDUE INFLUENCE.

See FRAUDULENT CONVEYANCES, 2; WILLS, 3.

USURY.

1. **NEGOTIABLE INSTRUMENTS — STIPULATION IN NOTE FOR COSTS OF COLLECTION — USURY.** — A stipulation in a note, by which the maker agrees to pay all costs for collecting it, not less than ten per cent, on failure to pay at maturity, includes an attorney's reasonable fee, and does not render the note usurious. *Williams v. Flowers*, 772.
2. **CONTRACT TO PAY ATTORNEY'S FEE.** — An agreement to pay a reasonable attorney's fee, which the payee of a note would have to pay if forced to collect it by suit, in addition to legal interest, does not render the note usurious. *Williams v. Flowers*, 772.
3. **SALE OF GOODS ON CREDIT AT INCREASED PRICE NOT USURIOUS WHEN.** — A contract for the sale of goods on a credit of thirty days at a certain price, with a stipulation that if they are not paid for within that time the price shall be fifteen per cent additional, is not usurious. But if the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the contract will be declared usurious. In such case the jury should be permitted to determine whether the fifteen per cent was a part of the price to be paid for the goods if payment was not made within thirty days, or was interest illegally reserved on the price entered on the books at the time of the sale. *Bass v. Patterson*, 279.
4. **UNREASONABLE SUM AS COMPENSATION AS EVIDENCE OF USURY.** — Where the lender of money, or his agent, and the borrower agree upon a sum for compensation to the former for services, for which he may charge the latter, it will not make the loan usurious, if agreed upon in good faith, even though it is unreasonable; the unreasonableness of the

amount, however, in respect to the services, is evidence of greater or less weight according as the amount is more or less unreasonable, that it was taken or stipulated for, in part at least, as compensation for the use of the money, and a mere cover to hide the usuriousness of the transaction. *Stein v. Swensen*, 234.

5. LOANS BY AGENT—KNOWLEDGE AND LIABILITY OF PRINCIPAL.—Under a general agency to conduct the business of money-lending, the principal is presumed to know the agent's general mode of carrying it on; and if the agent conducts it usuriously, the principal is presumed to know it, and if he permits it, is responsible to the same extent as if he had authorized it in advance. *Stein v. Swensen*, 234.

6. LOANS BY AGENT—EVIDENCE OF METHOD OF TRANSACTING BUSINESS.—When the defense of usury is set up in an action on a loan and extensions made by the lender through his general agent, evidence of the manner in which the agent transacted the business of his agency in loaning money, that he ordinarily used certain blanks, made loans for one month, and extensions for one month, and charged commissions of a percentage on the loans and extensions, nominally for his services rendered the borrower, but in fact to evade the statute against usury, is admissible. *Stein v. Swensen*, 234.

7. USURY, AGREEMENT FOR—EXTENSION—EVIDENCE OF CONTEMPORANEOUS ORAL AGREEMENT.—Where the defense of usury is set up to a loan on notes and extensions thereof, and a written agreement signed by the borrower, authorizing the general agent of the lender to negotiate the loan, and referring to extensions, is proved, evidence of an oral contemporaneous agreement made by the agent at the time of the loan, in respect to extensions of the notes upon payment of a commission, and evidently made as a means of avoiding the statute concerning usury, is admissible. *Stein v. Swensen*, 234.

VALUE

See INSURANCE, 15, 16.

VENDOR AND VENDER

1. EVICTION—MEASURE OF DAMAGES.—A purchaser of land under warranty deed is entitled, upon eviction, to the purchase price paid, as against the vendor, with interest from the date of eviction. *Conrad v. Effinger*, 646.

2. EVICTION—MEASURE OF DAMAGES—COUNSEL FEES.—Where a vendee is evicted for failure of title which the vendor employs counsel to defend, the vendee cannot recover from the vendor his counsel fees in addition to the price paid for the land, with interest thereon from eviction. *Conrad v. Effinger*, 646.

3. EVICTION AS TO PART—MEASURE OF DAMAGES.—Where a purchaser buys land with notice of infirmity of title, and, after improving it, sells it at an increased price, and the purchaser from him is evicted as to one fourth thereof, the first purchaser can recover of his vendor only one fourth of the price paid by him, while he must pay to his purchaser one fourth of the price received from him. *Conrad v. Effinger*, 646.

4. OPTION TO PURCHASE—CONSIDERATION.—An option for the purchase of land, limited to a certain time for a certain consideration, cannot be extended beyond that time by contract without a new consideration. Such contract is *nudum pactum*, and void. *Ide v. Leiser*, 17.

6. **CONTRACT FOR PURCHASE — STATUTE OF FRAUDS.** — An option or contract for the purchase of land signed by the vendor alone may be enforced by the vendee under a statute of frauds not requiring the writing to be signed by the party sought to be charged, but only by the party by whom the sale is to be made. *Ide v. Leiser*, 17.
 7. **BREACH OF CONTRACT TO PURCHASE — REMEDIES.** — Under a contract for the purchase of land, providing that the vendor may declare the contract void and take possession on failure of the vendee to perform the conditions named therein, the vendor may, upon the abandonment of the contract and of the premises by the vendee, either maintain a bill for specific performance, or a suit at law for the purchase price, or for repossession of the premises and damages for the breach of the contract. *Allen v. Mohn*, 126.
 7. **BREACH OF CONTRACT TO PURCHASE — MEASURE OF DAMAGES** in a suit by the vendor for breach of a contract to purchase land is the difference between the contract price and the value of the land at the time of re-entry and abandonment of the contract by the vendee, less what has been paid. The vendor can only be deprived of this remedy by the terms of his contract, or by his acts and conduct, constituting a waiver. *Allen v. Mohn*, 126.
 8. **PAROL CONTRACT TO PURCHASE — TENANCY AT WILL — EJECTMENT.** — A party in possession under a parol contract to purchase land is a tenant at will, and cannot be ejected by his grantor or by the latter's grantee, without demand for possession, or notice and refusal to surrender, or some other wrongful act by him to determine such possession. *Jones v. Temple*, 649.
 9. **VENDEE IN POSSESSION AS OWNER CLAIMING TITLE MAY DISPUTE HIS VENDOR'S TITLE.** — The rule that where a vendee enters into possession of premises under a contract, he cannot, while he remains in possession, dispute the title of his vendor, does not apply in a case where, at the time of the contract to purchase, the vendee is in possession as owner claiming title, and his entry was not under his vendor. *Greene v. Coase*, 458.
 10. **BONA FIDE PURCHASER — NOTICE — RECORD OF SATISFACTION OF MORTGAGE — PRESUMPTION.** — Where the record shows that a prior mortgage has been satisfied, without showing by whom payment was made, a purchaser having no other notice than the record may assume that payment was made by the party owing the primary duty to make it; and if the record only discloses that if a certain person paid the mortgage debt he is entitled to subrogation, the purchaser examining the title need not look beyond the record to ascertain whether or not the payment was in fact made by that person. *Ahern v. Freeman*, 206.
 11. **BONA FIDE PURCHASER — NOTICE OF ENTRIES IN RECORD-BOOKS.** — One purchasing land is charged with constructive notice only of such entries in the reception-book or index in the register's office as are by law required to be made. *Ahern v. Freeman*, 206.
- See **ABSTRACTS OF TITLE; ADVERSE POSSESSION, 5; COVENANTS; PARTIES, 2; SPECIFIC PERFORMANCE.**

VICE-PRINCIPALS.

See **MASTER AND SERVANT, 2.**

WAGERING CONTRACTS.**See INSURANCE, 2.****WAIVER.****See BILLS AND NOTES, 8, 20; INSURANCE, 5, 8, 9, 12, 13.****WAREHOUSEMEN.**

- 1. THE DUTY OF WAREHOUSEMEN** imposes on them the exercise of ordinary care only, or in other words, the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances. *Lancaster Mills v. Merchants' etc. Co.*, 586.
- 2. WAREHOUSEMAN WILL NOT BE HELD LIABLE ON ACCOUNT OF A DEFECT IN HIS WAREHOUSE** for a loss of goods by fire, when such defect did not cause the fire nor in any way contribute to the loss. *Lancaster Mills v. Merchants' etc. Co.*, 586.
- 3. WAREHOUSEMAN'S LIABILITY TO OWNER OF PROPERTY FOR NOT EFFECTING INSURANCE THEREON.** — If a warehouseman agrees with a common carrier to receive goods from the latter, and to insure the same while in his keeping for the benefit of the carrier, and after receiving goods pursuant to such agreement, fails to insure them, he is answerable to the owners thereof for any damage resulting to them from the failure to procure insurance as stipulated. *Lancaster Mills v. Merchants' etc. Co.*, 586.
- 4. WAREHOUSEMAN'S OBLIGATION TO INSURE.** — If, by the terms of a contract between a common carrier and a cotton-press company, the former agrees that the latter shall press all cotton which the carrier desires to have pressed during the continuance of the agreement, and that the press company shall warehouse the same, load it, after being compressed, on the cars of the carrier, and insure it while in its custody for the benefit of the carrier, the obligation of the press company is to insure against loss by fire all cotton in its presses for its full value, and covering every interest therein. Such obligation is not limited by the life of the dray tickets issued by the press company, nor by the surrender of such tickets and the issuing of a bill of lading by a carrier, but continues as long as the cotton remains in the custody of the press company. *Lancaster Mills v. Merchants' etc. Co.*, 586.
- 5. WAREHOUSEMAN INSURING PROPERTY IN HIS CUSTODY UNDER A CONTRACT REQUIRING HIM SO TO DO** is, in respect to such insurance, the trustee of the owners, and, as such, bound to make proofs of loss, and to institute proceedings for collection. *Lancaster Mills v. Merchants' etc. Co.*, 586.

See CARRIERS.**WARRANTY.****See COVENANTS.****WATERS.****See RIPARIAN RIGHTS; WHARVES.****WHARVES.**

- 1. WATERS — PRIVATE WHARF, WHAT CONSTITUTES.** — The right to erect a wharf or landing on a navigable stream having its foundation in the
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ownership of the land, when erected by an individual at his own expense, it is private property. The public may acquire an easement or right to the use of such landing by dedication on the part of the owner of the soil; but its use by individuals, with the permission of the owner, does not give the public the right to use it without his consent; and its use by the public, with his permission, for a number of years, and for his own emolument, will not amount to a dedication. *Compton v. Hankins*, 823.

2. **WATERS — WHARF, WHETHER PUBLIC OR PRIVATE.** — Whether or not a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if at the terminus of a public highway, practically forming a part thereof, or if it has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing. *Compton v. Hankins*, 823.
3. **WATERS — RIGHT TO MAINTAIN PRIVATE LANDING.** — Riparian owners have the right to construct private wharves and landings on navigable streams, subject to the public right of navigation. The owner has the same dominion and power to control such landings as any other private property, and to possess and use the same to the exclusion of the public. Hence the right to raft timber does not imply or carry with it the right to deposit or store logs or timber upon such private property preparatory to its being rafted. *Compton v. Hankins*, 823.
4. **WATERS — PRIVATE WHARF — RIGHTS OF OWNER.** — The objects for which a private landing on a navigable stream may be held and used may be public without affecting its private character. In such case there is an implied license to vessels to use it for receiving and discharging freight and passengers; and also to all persons to occupy it for lawful and customary purposes; but the owner may at any time revoke the license as to the entire public, or withhold permission from particular vessels or persons. *Compton v. Hankins*, 823.
5. **WATERS — PRIVATE WHARF — RIGHTS OF OWNER.** — The owner of a private landing or wharf may prohibit its use for storing and keeping of timber to be rafted, which may obstruct free access to and from vessels. *Compton v. Hankins*, 823.
6. **WATERS — PUBLIC AND PRIVATE WHARF.** — If a wharf or landing on a navigable stream is public, the owner is under obligation to concede to others the privilege of landing their goods. If it is private, he has the exclusive right to its use and enjoyment, or to permit such parties to use it as he sees proper. *Compton v. Hankins*, 823.

WILLS.

1. **NAME WRITTEN IN BODY OF INSTRUMENT NOT PRESUMED TO BE SIGNATURE.** — When a testator, or the maker of a contract, subscribes a will or contract at the end and in the manner in which instruments are usually signed, a presumption arises that he affixed his name at a signature thereto; but when the name is written in the body of the instrument, where a name is usually inserted as descriptive of the person who is to execute it, and rarely as a signature, no such presumption arises; and to

make it a valid signature, it must be shown that it was written with intent to make it his signature. Where, therefore, a testatrix writes her name at the beginning only of an alleged will, but there is no evidence to show that, directly or indirectly, by word or gesture, she referred to her name thus written as her signature, nor evidence of any act on her part from which it might be inferred that her name there written was intended to be in execution of a completed will, a finding or judgment that such name was there written with intent that it should have effect as her signature in final execution of a will, cannot be sustained, although it is proved that she said to one of the subscribing witnesses: "This is my will; take it and sign it." *In the Matter of the Will of Booth*, 422.

2. THE WORD "RELATIONS," when used in wills and statutes, is ordinarily construed as including relatives by consanguinity, and excluding relatives by affinity, unless a contrary intention is manifested. *Bennett v. Van Riper*, 418.

2. CONFIDENTIAL RELATIONS — PRESUMPTION OF UNDUE INFLUENCE — BURDEN OF PROOF. — The mere existence of confidential relations between the proponent and principal beneficiary under a will and the testator will not, without more, raise a presumption that the will was procured by the proponent by means of undue influence over the testator, nor cast the burden of proof on him to show that the will was executed without the exercise of undue influence, coercion, or fraud on his part. In addition to the existence of such confidential relations, the proponent must exercise some active interference in the preparation or execution of the will, to raise the presumption of undue influence on his part. *Bancroft v. Otis*, 904.

See DEEDS, 1; DEVISES; TRUSTS, 6.

WITNESSES.

1. WHEN HUSBAND AND WIFE ARE BOTH INTERESTED in the result of a suit, neither is competent as a witness. *De Farges v. Ryland*, 652.

2. DISCOVERY — NO ONE CAN BE REQUIRED TO CRIMINATE HIMSELF. — Hence, even in civil proceedings, a material fact cannot be elicited by discovery from the adverse party, if by discovering it he would be exposed to a criminal prosecution or to a penal recovery; but under the code of Alabama "the party is bound to answer all pertinent interrogatories, unless by the answer he subjects himself to a criminal prosecution." *Louisville etc. R. R. Co. v. Hall*, 832.

3. IMPRACHMENT — PROOF OF CHARACTER. — In impeaching a witness, the inquiry is not limited to character for truth and veracity, but may extend to general moral character; and although a notorious want of chastity in a female witness will create a general bad character and general reputation, still, the independent fact that she is a prostitute, or keeps a house of ill-fame, is not admissible to impeach her. *Birmingham etc. Ry Co. v. Hale*, 743.

4. EVIDENCE — PROOF OF CHARACTER. — A witness testifying to the character of a party must, on his direct examination, confine his statement to what that character is, as upon his own knowledge, and he is not allowed to substitute for his knowledge the means or sources of it, although, on cross-examination, he may be asked what he has heard in the community touching the character of the party inquired about. *Montgomery v. Crockett*, 832.

CRIMINAL LAW — OPINION AS TO AGE AS EVIDENCE. — When the issue involved is as to whether or not the accused was fourteen years of age at the time of the commission of the alleged felony, a witness who has known him for seven or eight years is incompetent to testify that, in his opinion, the accused was fifteen or sixteen years of age. *Martin v. State*, 844.

See **EVIDENCE; RAILROAD COMPANIES**, 18.

WOMAN.

See **OFFICE AND OFFICERS**, 2.

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